Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT LEE BECK, MD, DMD,
Petitioner,

v.

TEXAS STATE BOARD OF
DENTAL EXAMINERS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Fifth Circuit shift the burden of establishing the affirmative defense of absolute immunity from the party asserting absolute immunity to the non-moving party in a summary judgment proceeding, when the United States Supreme Court and other circuit courts place this burden squarely on the party seeking absolute immunity?

2. Are the investigatory acts of an alleged "quasi judicial" body entitled to absolute immunity, or, like prosecutors, are those acts subject only to qualified immunity?

3. Does the Texas Controlled Substances Act, Tex. Civ. Stat. Art. 4467-15 §5.01; Tex. Health & Safety C. §481.181, which provides for warrantless searches to occur in a reasonable manner, at a reasonable time, within reasonable limits provide an adequate substitute for a warrant under the United States Constitution's Fourth Amendment and Supreme Court jurisprudence?

PARTIES TO THE PROCEEDINGS

Petitioner

Robert Lee Beck, MD, DMD. Petitioner is an individual and has no corporate affiliations.

Respondents

The Texas Board of Dental Examiners consisting of William J. Kemp; Brian Babin; Jack L. Bolton; Randolph D. Minatra; Frank Santos; Terry R. Dickinson; Rober Byrne; Charles T. Ku; and Ronald H. Shamblin, and its employees Michael Pitcock and William S. Nail.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 204 F.3d 629 (5th Cir. 2000). A copy of the opinion is included in the Appendix at Appendix A at 1a-21a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on March 3, 2000. On March 16, 2000, Petitioner timely filed a Petition for Panel Rehearing which the United States Court of Appeals denied on April 4, 2000 (App. H at 94a - 95a)[1]. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Panel Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(i) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I

Congress shall make no law . . . abridging the freedom of speech . . . and to petition the Government for a redress of grievances.

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[1]Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i). Citations to the record below will be to the docket entry and will be referred herein as "Doc." followed immediately by the docket entry number.

U.S. Const., amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. XIV

No state shall . . . deprive any person of life, liberty or property, without due process of law.

Texas Administrative Code

Pertinent sections of the Texas Administrative Code; 22 T.A.C. § 109.44 (Vernons 19 85) (in relevant part) are provided at App. Q.

STATEMENT OF THE CASE

Dr. Beck was one of the first dentists to advertise his dental practice in Texas. (App. F). At that time, the Texas State Board of Dental Examiners ("TSBDE" or "the Board") prohibited such advertising. In 1980, Dr. Beck joined as a lead plaintiff, other dentists to enjoin the TSBDE from prohibiting dentists from advertising their professional services in *Akin v. Texas State Board of Dental Examiners*, Cause No. 301132, filed in District Court in Travis County, Texas. (App. F. at 81a). After Dr. Beck and the other plaintiffs prevailed at trial, the TSBDE appealed and the suit was subsequently settled when the Board agreed to allow dentists to advertise their practices. (Id.).

After the settlement of the *Akin* suit, Defendant Michael Pitcock and Wayne Youngblood, Board investigators, along with Investigator Frank Perez, a uniformed Department of Public Safety Officer, conducted a warrantless search of Dr. Beck's dental office on July 7, 1986. (App. P). At the time of this search, the Board's own regulations did not permit a warrantless search. (App. Q). The Board regulations in effect at the time of the search permitted that only records were subject to inspection by the Board, and were subject to inspection only after an appointment was made with the dentist. (Id.)

As a result of information seized in that search, the TSBDE revoked Dr. Beck's dental license on November 6, 1987.[2] (App. N). Dr. Beck filed suit against the Board,

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[2] Dr. Beck did not receive adequate notice of the hearing; was not present at the hearing and did not have the opportunity to confront and cross-examine witnesses against him. (App. K).

Cause No. 88-CI-06246, *Beck v. Texas State Board of Dental Examiners*, in the 285th District of Bexar County, Texas. The trial court found in favor of Dr. Beck, ordering a remand on the issue of the license revocation. Pending the TSBDE's appeal of this decision, Dr. Beck and the Board entered into an Agreed Board Order in April, 1992, and Dr. Beck's dental license was subsequently reinstated. (App. E, M).

In 1992, Sunset hearings were conducted on the TSBDE before the Texas Legislature. Dr. Beck had no knowledge of the conduct alleged in this lawsuit until November, 1992, when former Board Investigator Wayne Youngblood testified under oath before the legislative "Sunset Committee." (App. F at 84a). On February 5, 1994, Wayne Youngblood, asserted in a signed statement, reflecting his testimony at the Sunset Committee hearings, that:

> "The Board targeted certain dentists for selective prosecution because of their practice of advertising. Dr. Robert L. Beck was among the dentists targeted for license suspension or revocation because of advertising." (Id.).

(See also App. L). Dr. Beck then commenced this action asserting that all actions taken against him by the TSBDE since 1986 were in retaliation for seeking to enforce his lawful right to exercise his First Amendment right to advertise. (App. F.).

However, because the facts remained uncontroverted at the hearing, the Board members unanimously revoked Dr. Beck's dental license. (App. N).

The District Court had jurisdiction over the original action pursuant to 28 U.S.C. §1331 as a civil action arising under the laws and Constitution of the United States and which involved a violation of federal law pursuant to 42 U.S.C. §1983 and 18 U.S.C. §1961 et seq.. Respondents filed Defendant's Second Motion for Summary Judgment on July 2, 1998. Petitioner's attorney did not file a timely Response to Defendant's Second Motion for Summary Judgment.

On July 31, 1998, the District Court for the Western District of Texas, District Judge H. F. Garcia granted Defendant's Second Motion for Summary Judgment and dismissed with prejudice Plaintiff's claims against Defendants. District Judge H.F. Garcia's Order simply stated that the basis for the court's decision "could be found in *O'Neal v. Mississippi Board of Nursing,* 113 F. 3d 62 (5th Cir. 1997)." (App. C) On August 18, 1998, Plaintiff filed a Motion for Relief from Judgment or in the Alternative, Motion to Correct Summary Judgment and, Plaintiff's Motion for Leave to Introduce Documentary Evidence in Support Thereof. (App. D) Defendant's filed their Response to Plaintiff's Motions on September 11, 1998. On November 3, 1998, District Judge H.F. Garcia denied Plaintiff's Motions. (App. B).

Petitioner filed a timely appeal with the Court of Appeals for the Fifth Circuit. On March 3, 2000, the Court of Appeals affirmed the District Court's decision. (App. A). The United States Court of Appeals found the Board was entitled to absolute immunity, however, Defendant Pitcock was only entitled to qualified immunity. Petitioner's timely filed a Petition for Panel Rehearing in the Fifth Circuit, which was denied on April 4, 2000 (App. H).

ARGUMENT

I. In contravention of Supreme Court precedent, the Fifth Circuit has relieved any official seeking absolute immunity of their burden to prove the elements of this affirmative defense as a matter of law in a summary judgment proceeding.

In affirming the grant of absolute immunity to the TSBDE on summary judgment, the Fifth Circuit dispensed with Respondent's burden of proving their affirmative defense all together, holding:

> "The moving party is *not required to put forth evidence to meet its summary judgment burden for a claim of immunity*. It is sufficient that the movant in good faith pleads that it is entitled to absolute . . . immunity." [3]

(App. A at 7a)(emphasis added). This holding directly contradicts Supreme Court precedent which places the burden of proving the right to absolute immunity squarely on the

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[3] As "legal authority" for it's position, the Fifth Circuit cites to three cases - none of which address the grant of absolute immunity in a summary judgment proceeding, let alone the grant of absolute immunity absent any factual support. Both *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992) and *Whatley v. Philo*, 817 F.2d 19 (5th Cir. 1987) address qualified, not absolute, immunity; and the U.S. Supreme Court case of *Bogan v. Scott-Harris*, 523 U.S. 44 (1999) cited by the Fifth Circuit was not a summary judgment proceeding.

proponent.[4] *Butz v. Economou*, 438 U.S. 478 (1978). Instead, the Fifth Circuit's holding wholly shifts the burden of *disproving an affirmative defense* to the non-movant, effectively setting precedent for an *automatic grant* of absolute immunity upon the officials unsupported assertion of absolute immunity. The result is that the Fifth Circuit has eliminated the proponent's summary judgment burden for all assertions of absolute immunity, even those which are unsupported.

A. Summary Judgment Standard

The burden of proof in a summary judgment proceeding is on the same party who would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, the movant bears the burden of establishing the absence of any genuine issue of material fact and that the movant is entitled to judgment as a matter of law on those actions and defenses for which they bear the burden

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[4] This is also contrary to settled Texas Supreme Court case law, as well as other Circuit Courts; See *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex. 1975) (holding defendants moving for summary judgment based on the affirmative defense of absolute immunity are required to establish all elements of the defense as a matter of law.); see also, *Bettencourt v. Board of Registration in Medicine in the Commonwealth of Massachusetts*, 904 F.2d 772 (1st Cir. 1990) and *Watts v. Burkhart*, 978 F.2d 269 (6th Cir. 1992).

of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

When a defendant moves for summary judgment on it's affirmative defense it must show the absence of a genuine issue of material fact and establish each element of it's defense as a matter of law. See *Celotex*, 477 U.S. at 322-323; see also *Buttry v. General Signal Corp.*, 68 F.3d 1488, 1492 (2d Cir. 1995); *Irby v. Bittick*, 44 F.3d 949, 953 (11th Cir. 1995); *Crescent Towing & Salvage Co. v. M/V Anax*, 40 F.3d 741,744 (5th Cir. 1994); *Fox v. Citicorp Credit Serv. Inc.*, 15 F.3d 1507, 1514 (9th Cir. 1994). Unless the defendant carries its burden, and produces evidence establishing its defense as a matter of law, *it is not entitled to summary judgment*. *Crescent Towing & Salvage Co.* at 744, 745 (emphasis added), citing *Celotex*, 477 U.S. at 322-323.

This summary judgment rule contemplates a shifting burden, and the non-movant (Petitioner) is under no obligation to respond unless the movant (Respondent) discharges their initial burden to show an absence of any material fact and that movant is entitled to judgment as a matter of law. *Irby* at 953; see also *Hibernia National Bank v. Administration Cent. Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985). Only if the defendant carries its burden does the burden shift to the plaintiff to produce evidence demonstrating the existence of a triable issue of fact on the elements of defendant's defense. *Irby*, 44 F.3d at 953; *Kansa Reinsurance Co., v. Congressional Mtg. Corp.*, 20 F.3d 1362, 1371 (5th Cir. 1994).

Respondent's did not carry their summary judgment burden. Indeed, they wholly failed to offer even a scintilla of evidence to establish any elements of their affirmative defense

of absolute immunity and any absence of genuine issues of material facts.

B. Absolute Immunity

Absolute immunity is an affirmative defense. *Butz v. Economou*, 438 U.S. 478 (1978). Thus, the "*official seeking immunity bears the burden* of showing that immunity is justified for the function in question," proving that public policy requires such a broad protection of their actions. *Burns v. Reed*, 500 U.S. 478, 486-487 (1991) (emphasis added); *Butz*, 438 U.S. at 506. In order for an official to demand the protection afforded by absolute immunity, the moving party must show first, that the responsibility of the office embraces a function so sensitive as to require a total shield from liability; and second, that the official was discharging the protected function when performing the act for which liability is asserted. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This functional approach to the question of absolute immunity looks to the nature of the function performed, not the identity of the actor who performed it. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976).

Qualified immunity is the norm. This Courts recognition of the absolute exemption from liability afforded by absolute immunity has been "quite sparring." *Forrester v. White*, 484 U.S. 219 (1988). Immunities are extended to government officials only when overriding considerations of public policy demand the official be given a measure of protection from liability to ensure his ability to function effectively. However, even where a "measure of protection" is warranted, there is a presumption that qualified immunity provides sufficient protection for government officials, and only in exceptional circumstances do special functions of an

official require an absolute shield from liability. *Butz v. Economou*, 438 U.S. 478, 508 (1978).

Judges have absolute immunity due to the special nature of their responsibilities. *Butz v. Economou*, 438 U.S. at 511-512. Likewise, this Court has found that those officials who are "functionally comparable" to judges have been granted quasi judicial immunity. *Id.* In order for quasi judicial (absolute) immunity to be extended to officials other than judges, as in the case *sub judice*, and satisfy the first element of absolute immunity, this Court requires a *case by case* analysis of certain factors which weigh the costs and benefits of denying or affording absolute immunity:

> 1) the need to assure that the individual can perform his functions without intimidation or harassment,
>
> 2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct,
>
> 3) insulation from political influence,
>
> 4) importance of precedent,
>
> 5) adversarial nature of the process and
>
> 6) correctability of error on appeal.

Butz, 438 U.S. at 512. (emphasis added).

Not all official conduct is immune – the official must prove that when performing the act for which liability is asserted, that act was performed within the scope of the official's immunity. *Harlow v. Fitzgerald,* 457 U.S. 800,

812-813 (1982). As evidenced by the first *Butz* factor, absolute immunity is designed to "free the judicial process from the harassment and intimidation associated with litigation." *Burns v. Reed*, 500 U.S. 477, 494(1991). The concern with vexatious litigation, then, is not merely a generalized concern with interference with an officials duties, but is a concern with interference closely related to the judicial process. *Id.* The critical inquiry thus becomes -- "was the action one taken when engaged in the discharge of duties imposed upon the official by law?" *Butz*, 438 U.S. at 520 (Rehnquist concurring in part, dissenting in part), citing, *Spalding v. Vilas*, 161 U.S. 483,498 (1896).

In determining immunity, the court must accept the allegations of the complaint as true. *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993). Petitioner's complaint asserted the Board targeted Dr. Beck, generated complaints and directed an investigation which resulted in a warrantless search of his office. The Complaint asserts further that the sole purpose of the search was to gather any evidence available to "get Beck" and punish him for the exercise of his First Amendment rights.[5] (App. F at 81a-85a). Petitioner also asserted that the Board's "hearing" was a means to an end, and that the lack of procedural safeguards rendered the process unconstitutional. (App. F).[6]

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[5] Petitioner also asserts he was not the only "target." Two other dentists were similarly treated, Dr. Akin and Dr. Soloman. (App. F at 81a).

[6] Contrary to the Fifth Circuit's Opinion at footnote 4 (App. A), the transcript of the Board's hearing for Dr. Beck's license revocation clearly indicates that all certified mailings to Petitioner were not delivered, indeed the record indicates that the envelopes introduced at the hearing were opened and empty ,which

Neither Respondent's Answer, nor its Second Motion for Summary Judgment with exhibits, satisfies the two elements required to warrant absolute immunity: 1) to establish that the responsibility of the office embraces a function so sensitive as to require a total shield from liability; and 2) that the official was discharging the protected function when performing the act for which liability is asserted. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). First, Respondent's Answer sets forth no facts on which to evaluate the capacity in which the officials were acting when performing the actions asserted by Petitioner. Instead, it merely concludes "they are immune from liability and not subject to suit for damages for any alleged injury, wrong, loss, or damage from investigation, report, recommendation, statement, evaluation, finding, order, or award made in the course of any of said Defendants performance of assigned, designated, official or statutory duties, pursuant to Tex. Rev. Civ. Stat. art. 4551j (Vernon 1995)."[7] (Doc. 84).

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means their contents could not be ascertained. Doc. 176, Appendix B pp. 3-9. In addition to the lack of notice, the record also reflects Defendant Pitcock failed to re-audit his findings on the prescription drugs found the day of the search. After the search, Mr. Youngblood received additional information from Dr. Beck. (App. L). Mr. Youngblood testified that the drug audit *with the additional information supplied by Dr. Beck* differed from the initial count done in Dr. Beck's office. (App. L). Despite this, Defendant Pitcock did not amend his findings, saying "it wouldn't make a difference." (App. L). The Board's Order bears this out, as it is different from the findings made by Mr. Youngblood.

[7] This statute cited in Respondent's Answer was not the statute in effect at the time of the acts Petitioner complains of - the actions occurred in 1987, yet Respondent's cite to a 1995 statute.

Second, Respondent's Second Motion for Summary Judgment makes a general claim that they are entitled to absolute immunity from liability due to their status as members of a "medical/health profession board." It fails to provide any facts to justify the application of absolute immunity. The TSBDE asserted in its *one paragraph* addressing absolute immunity that "the Board functions as a judicial body and was so acting with regard to the Plaintiff. . . . Defendants or [sic] in the case at bar were quasi judicial actors with regard to the Plaintiff they are entitled to absolute immunity." (App. E). Respondent's have failed to show by affidavit or otherwise that they functioned in a 'quasi-judicial role,' that they meet any of the standards of the *Butz* test, or that absolute immunity is proper as to the function in question - namely the function of targeting Petitioner and directing a warrantless search of his offices in order to harass and intimidate Petitioner for exercising his First Amendment rights.

Respondent's failure to allege facts supporting either element required to warrant absolute immunity is apparently inconsequential since, under the Fifth Circuit's holding, Respondent bears no burden. Under the present holding, the official need only make a bare assertion that the official is entitled to absolute immunity. Once the movants' meet their burden (if you can call it that), the burden shifts to the non-movant to disprove the existence of an affirmative defense that has not yet been proved. This bare assertion that Respondents are "quasi judicial" officials and therefore entitled to absolute immunity because of their status as board members flies in the face of everything *Butz* and its progeny stand for. Respondent's, the District Court, and the Fifth Circuit have relied totally upon Respondent's "title" as the basis for the application of absolute immunity.

Where no response to summary judgment is filed -- the official is granted absolute immunity by default. This holding effectively grants absolute immunity for *all* functions performed by an official simply because they are an official -- it is a grant of absolute immunity based on the identity of the actor, in direct contravention of *Butz*. Indeed, it abrogates the necessity for analyzing the *Butz* factors, for considering the particular function for which liability is sought, and renders moot any need to justify this full exemption from liability through the considered inquiry into immunity historically accorded officials at common law and the interest behind those grants of immunity. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432-433 (1993). This is not current Supreme Court law, and is an improper and complete abrogation of an official's burden to prove it is entitled to the affirmative defense of absolute immunity.

II. The TSBDE was acting as an investigator when it directed the warrantless inspection of Petitioner's Office, and acts of investigation are not quasi judicial, therefore the Board is not entitled to absolute immunity.

The Court of Appeals failed to apply the *Butz* functional approach to, or require any common law justification for its grant of absolute immunity for, acts of investigation by an alleged quasi judicial body, effectively granting absolute immunity to quasi judicial actors for pure acts of investigation. Acts of investigation are not quasi judicial acts entitled to absolute immunity, instead they are more analogous to the investigation and administrative functions performed by a prosecutor. *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976); *Buckley v. Fitzsimmons*, 509 U.S.

259 (1993). The Fifth Circuit's opinion held that the grant of absolute immunity to the TSBDE was proper under *O'Neal v. Mississippi Board of Nursing*, 113 F.3d 62 (5th Cir. 1997). (App. A). Notably, the issue in O'Neal was whether the Nursing Board could revoke licenses. *O'Neal v. Mississippi Board of Nursing*, 113 F.3d 62 (5th Cir. 1997). This is not the case *sub judice*. The Fifth Circuit had to determine whether the Board's actions in targeting Petitioner for retaliation by directing an investigation in which the Board cooperated with law enforcement, and participated in a warrantless and illegal search of Petitioner's office without prior notice and before any complaint was filed warranted absolute immunity.

Absolute prosecutorial immunity is not granted for every litigation-inducing conduct. *Burns v. Reed,* 500 U.S. 478 (1991). For instance, a prosecutor does not enjoy absolute immunity for acts of investigation.[8] *Imbler*, 424 U.S. at 424 (prosecutor's participation in a search and seizure constitutes investigative, rather than quasi judicial activity); *Buckley,* 509 U.S. at 273 (prosecutor's search for favorable evidence prior to establishing probable cause was investigative not quasi judicial action):

> "There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one

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[8] Nor is absolute immunity granted for making false statements in an affidavit supporting an arrest warrant, *Kalina v. Fletcher*, 522 U.S. 118 (1997); or for participating in an illegal search and seizure, *Imbler*, 424 U.S. at 430-431. None of these acts were found to interfere with the officials exercise of quasi judicial functions.

> hand, and the detective's role in *searching for the clues and corroboration that might give him probable cause* to recommend that a suspect be arrested on the other hand."

(emphasis added).

A prosecutor is not absolutely immune for cooperating with law enforcement officers in obtaining a search warrant based on false information. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). In *Buckley,* this Court held that prosecutors do not have absolute immunity from liability for the alleged fabrication of evidence where no probable cause to arrest or initiate judicial proceedings exists. *Id.* at 274. In support, this Court noted the absence of any authority to justify the official's argument that a "prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime was immune from liability at common law, either in 1871 or at any date before the enactment of § 1983." *Id.* at 275. Since investigative actions are analogous to those of police officers, the prosecutor is liable like a police man, if, in so acting, a plaintiff is deprived of constitutional rights. *Id.* at 273-274.

On July 7, 1986, the Board directed Defendant Michael Pitcock to conduct an unauthorized and warrantless search of Dr. Beck's dental office. This "mission" was entirely investigative in nature, *Buckely,* 509 U.S. at 274, and it's purpose was to search for any evidence to "get Beck." (App. J). To that end, accompanying Defendant Pitcock and Mr. Youngblood of the TSBDE was Trooper Frank Perez of the Texas Department of Public Safety ("DPS"). Defendant Pitcock clearly explained it was not necessary to have DPS Trooper Perez present for the search, but that Perez was there to investigate criminal activity – a criminal investigation for

which there was no probable cause,[9] and which the TSBDE was not authorized to prosecute or investigate.[10] (App. J). Despite Defendant Pitcock's comments, the only authority presented to Dr. Beck for the search, was the warrantless Notice of Inspection pursuant to the Texas Controlled Substances Act. (App. P).

The fact that Petitioner's license was eventually revoked provides no protection for the Board. As in *Buckley*, the fact that the plaintiff was eventually indicted did not retroactively shield the investigative activities of the prosecutor, since such an application would allow every prosecutor a shield from liability "for any constitutional wrong against innocent citizens by ensuring they go to trial." *Buckley,* 509 U.S. at 275-76. Moreover, almost fifteen months elapsed between the search and the Board hearing which revoked Petitioner's dental license.[11]

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[9] It is undisputed that a complaint was filed with the Board until after the search of Petitioner's office occurred. Moreover, since Officer Perez did not have a search warrant, there was no probable cause finding. Defendant Pitcock's own testimony evidences that the criminal investigation was contemplated and executed on the *pretext of an administrative search* of Dr. Beck's office. (App. J).

[10] Importantly, *no charges were ever filed* against Petitioner by the Texas Department of Public Safety on the results of the search.

[11] This delay is meaningful, as this Court noted in *Buckley*, "It was well after the alleged fabrication of false evidence concerning the bootprint that a special grand jury was empaneled." 509 U.S. at 275.

This was a personal vendetta against Petitioner, and the Board was determined to use it's power and authority to punish him -- the evidence bears this out. The Board directed Defendant Pitcock to investigate and search Petitioner's office, without notice or warrant and without statutory authority.[12] In clear contravention of statutory protocol, it wasn't until *after* this search or investigation that *the Board filed a complaint* against Petitioner.[13] This means the Board conducted an investigative search - indeed a search motivated by *retaliation*. The Board succeeded in getting back at Dr. Beck. (App. L).

The Board is not entitled to absolute immunity for its role in directing the search of Petitioner's office. Like *Buckely*, the Board, by directing the search of Petitioner's

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[12] See argument III *infra*.

[13] In an issue of first impression in the Fifth Circuit, the Court of Appeals rejected Petitioner's argument that Defendant Pitcock was a complaining witness under *Kalina v. Fletcher*. The Court of Appeals stated that since there is no evidence he verified the complaint against Dr. Beck, Defendant Pitcock could not be a complaining witness. While the original complaint against Dr. Beck is not part of the record, Board Regulation V.T.C.A. Art. 4548h § 4 provides that all complaints to the Board must be subscribed and sworn to by the person making the complaint. It is undisputed that the Board made the complaint, although it is unclear who subscribed and swore to the complaint. The fact remains that both the Board and Defendant Pitcock functionally acted as complaining witnesses when they deliberately set in motion a series of events which they anticipated would (and did) bring about Petitioner's prosecution. As complaining witnesses, they are not entitled to absolute immunity. See *Harris v. Roderick*, 126 F.3d 1189, 1198 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998).

office, was "searching for clues" that *might* give the Board probable cause to issue a complaint and revoke his licence. Like *Buckley*, the Board has wholly failed to put forth any recognized common law right to absolute immunity for the Board's actions of targeting Petitioner and directing a warrantless search of his office before any complaint was filed. At most, the Board is entitled to qualified immunity.

III. The Texas Controlled Substances Act Fails to Provide an Adequate Substitute for a Warrant Under the Fourth Amendment and Supreme Court Jurisprudence.

The Court of Appeals failed to apply the *Barlow's* and *Burger* analysis to the Texas Controlled Substances Act. This failure results in precedent which holds constitutional the very warrantless search provisions this Court found unconstitutional in *Marshall v. Barlow's,* 436 U.S. 307 (1978).

Government officials performing discretionary functions are not protected from civil liability under the doctrine of qualified immunity where their conduct violates a "clearly established statutory or constitutional right of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Claims of qualified immunity require a two step analysis: 1) determine whether the plaintiff has asserted a violation of a clearly established constitutional right and, if so 2) determine whether the defendant's conduct was objectively reasonable. *Wilson v. Layne*, 119 S. Ct. 1692, 1697 (1999). Qualified immunity turns on whether a defendant has violated a clearly established right. *Id.*

Petitioner had a reasonable expectation of privacy in the dental records. Defendant Pitcock's inspection of Petitioner's office violated clearly established constitutional Fourth Amendment rights. Defendant Pitcock was not acting within the scope of his discretionary authority. And finally, despite Supreme Court jurisprudence to the contrary, the Court of Appeals found the warrantless search provision of the Texas Controlled Substances Act constituted an adequate substitute for a warrant.

A. Petitioner Asserted Violations of His Fourth Amendment Rights

Warrantless searches are presumptively invalid and in violation of a plaintiff's constitutional rights. *Horton v. California*, 496 U.S. 128 (1990). Even administrative statutes that purport to authorize warrantless inspections violate the Fourth Amendment. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). Warrantless searches become constitutional only 1) if there is a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made,[14] 2) if warrantless inspections are necessary to further the regulatory scheme, and 3) where the inspection program provides a constitutionally adequate substitute for a warrant, in terms of certainty and regularity of its application. *New York v. Burger*, 482 U.S. 691 (1987). It is this third part of the test that is in question here -- *did the inspection program*

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[14] Petitioner contends that Defendant's Second Motion for Summary Judgment's conclusory statement that "Texas obviously has a "substantial" interest in overseeing the use of controlled substances in industries such as dentistry" is insufficient to establish this element. (App. E) See *Donovan v. Dewey*, 452 U.S. at 602; *New York v. Burger*, 482 U.S. 691, 702 (1987).

under the then applicable and co-existing Texas State Board of Dental Examiners regulations ("Board regulations") and the Texas Controlled Substances Act provide a constitutionally adequate substitute for a warrant? They do not.

1. Petitioner Had A Reasonable Expectation of Privacy

Petitioner had a reasonable expectation of privacy in his records. The Texas State Board of Dental Examiners Regulation, 22 Tex. Admin. C. §109.144 ("22 T.A.C. §109.144"), according to Respondent's summary judgment argument, "directly addresses the expectation of privacy held by dentists regarding their dental records." (App. E at 71a-72a) Respondent's argued that since dental records could be inspected "on demand" dentists had no expectation of privacy in their records.

Petitioner's records were not subject to inspection on "demand." 22 T.A.C. § 109.144, as Respondent's Second Motion for Summary Judgment contends -- that statutory provision *was not in effect at the time of the search in 1986.* It is undisputed that 22 T.A.C. § 109.144(a) did not authorize inspections without a warrant or its equivalent at the time the search of Dr. Beck's office was conducted in 1986. Far from it, the Board's regulations only permitted record inspections "after and upon appointment with the dentist." 22 T.A.C. § 109.144(a), as amended and effective March 8, 1985, 10 Tex. Reg. 660 (App. Q). This necessarily means that on July 7, 1986, Petitioner had a reasonable expectation of privacy in his dental records.

2. Texas Controlled Substances Act Did Not Provide Adequate Substitute for Warrant

Contrary to established Supreme Court precedent, the Court of Appeals found constitutional the same statutory guidelines this Court found unconstitutional in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

The Texas Controlled Substances Act cited by Respondent fails to provide an adequate substitute for a warrant because the enforcement procedures in the statute, lack, in both design and practice, safeguards that are roughly equivalent to those contained in traditional warrants, and therefore it is unreasonable.[15] *Barlow's*, 436 U.S. at 321. As the statute existed in 1986, Tx. Civ. Stat. Art. 4476-15 § 5.01 *et. seq*,[16] it provided:

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[15] Although Respondent's did not argue that the State Board of Dental Examiners regulations provided a constitutionally adequate substitute for a warrant (App. E), the Board's Regulations as they existed in 1986, 22 T.A.C. §101.001 *et seq.*, provided only for inspection upon making an appointment with the dentist -- there is no adequate substitute for a warrant under this statutory scheme which satisfies the Fourth Amendment.

[16] Again, Respondent's Second Motion for Summary Judgment failed to provide the correct provision, citing instead to the version of the Texas Controlled Substances Act, Tex. Health & Safety Code § 481.181, which was amended and effective in 1989, two years after the search of Petitioner's office.

(c) Inspections under Subsection (b)[17] of this section shall be carried out through *officers or employees designated by the director*.[18] Any such officer or employee shall have the right to enter the premises and conduct such inspection at *reasonable times* upon stating his purpose and presenting to the owner, operator, or agent in charge of the premises appropriate credentials and written notice of inspection authority.

(d) An officer or employee of the director shall have the right to: (1) inspect and copy records, reports and other documents required to be kept or made under this Act; (2) inspect within *reasonable limits* and in a *reasonable manner,* controlled premises and all pertinent equipment, finished and unfinished drugs and other substances or materials, containers, and labeling found therein, . . . all other things therein including records, files, papers, processes, controls, and facilities appropriate for verification of the records, reports, and

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[17] Subsection (b) reads "For the purpose of inspecting, capping and verifying the correctness of the records, reports, or other documents required to be kept or made under this Act and otherwise facilitating the carrying out of this functions under this Act, the director is authorized . . . to enter controlled premises and to conduct inspections thereof, and of the things specified in this section , relevant to those functions."

[18] The "director" is the Director of the Texas Department of Public Safety or an employee of the department designated by him. Tx. Civ. Stat. Art. 4476-15 §1.02(8).

> documents required to be kept under this act or otherwise bearing on the provisions of this Act.

(emphasis added).

Respondent's assert, without more, that since the Texas Controlled Substances Act allows for inspection of the records, the statute is "reasonable" for purposes of the Fourth Amendment. This same argument was made by officials in *Barlow's* -- an argument this Court rejected. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). In *Barlow's*, a businessman refused to permit an inspector from the Occupational Safety and Health Administration to conduct a warrantless search of his premises under section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), ("OSHA"). *Barlow's*, 436 U.S. at 309-310 The government argued the statute specifically empowered agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction to inspect for safety hazards and regulatory violations, thus, the administrative search was necessarily reasonable under the Fourth Amendment. *Id.* This Court did not agree, finding that a government inspector without a warrant, stands in *no better a position* than a member of the public without a warrant. *Id.* at 315.

a. The Statute is Unreasonable Since No Equivalent Safeguards to that of a Traditional Warrant Exist

Statutory enforcement procedures which fail to provide, "in both design and practice, safeguards roughly equivalent to those contained in traditional warrants," require a judicial warrant. *U.S. v. Mississippi Power & Light Company; U.S. v. New Orleans Public Service, Inc.*, 638

F.2d 899 (5th Cir. 1981), cert. denied 454 U.S. 892 (1981) (Fifth Circuit Court applied, on remand from this Court, the *Barlow's* analysis to Executive Order 11246 (requiring all government contractors maintain an affirmative action plan)) citing *Marshall v. Barlow's*, 436 U.S. 307 at 321(1978). For instance, where a statutory or regulatory scheme allows for resort to federal courts before an inspection is forced upon a party, then the inspection will not "run afoul" of the Fourth Amendment. *Id.*

In 1986, there were *no provisions* in the statutory scheme providing for resort to the courts prior to an inspection in either the Texas Controlled Substances Act, nor the Board regulations. Indeed, the Texas Controlled Substances Act specifically authorizes its officers or employees to obtain search warrants. Tx. Civ. Stat. Art. 4476-15 § 5.13; Tex. Health & Safety C. §481.182. Yet, the Act also provided that a willful or unreasonable refusal to allow an authorized inspection would be grounds for revocation and suspension of a registration. *Id.* at § 3.04(6). The Board regulations did not add any provision for resort to the courts until 1993. See V.T.C.A. Art. 4549-1.1, added by Acts 1993, 73rd Leg., ch. 416, § 3, eff. Sept. 1, 1993. Respondents cannot rely upon these statutory warrantless search provisions, they are unreasonable for purposes of the Fourth Amendment.

b. The Statute is Unreasonable Since No Limits Are Placed On Discretion of Inspecting Official

The Texas Controlled Substances Act also fails to provide any standards to guide inspectors in their selection of establishments to be searched and in the exercise of their authority to search. *Donovan v. Dewey*, 452 U.S. 594, 601 (1981), quoting *Marshall v. Barlow's*, 436 U.S. 307 (1978).

In finding the OSHA search provision violative of the Fourth Amendment, this Court noted that guidelines for inspectors were lacking since the statute simply provided the search be performed "at . . . reasonable times, and within reasonable limits and in a reasonable manner."[19] *Id.* The Texas Controlled Substances Act mirrors precisely that in *Barlow's*, it provides for "inspections" at "reasonable times" "within reasonable limits and in a reasonable manner." Tx. Civ. Stat. Art. 4476-15 § 5.01(b)(c). The Texas Controlled Substances Act, like the search provision under OSHA must fail.

Also significant, is the complete absence of evidence indicating how Trooper Perez selected Dr. Beck's office for inspection. First, there is no evidence that Petitioner was subject to the Texas Controlled Substances Act, and second, there are no provisions or criteria in the statue for selecting "controlled premises" for inspection.

Contrary to Respondent's assertion, the Board regulations did not require dentists to maintain their records in accordance with the Texas Controlled Substances Act in 1986. (App. E at 72a). Again, the provision to the Board's regulations cited by Respondents, 22 T.A.C. 109.144(e) *did not exist in 1986* -- this provision was not added until 1991. See 16 Tex. Reg. 4621-4622, effective September 6, 1991. This is Respondent's only evidence that Petitioner was subject to the Texas Controlled Substances Act.

Petitioner was targeted for this search by the Board for exercising his First Amendment rights. Evidence indicates

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[19] Notably, this language is still present in the statute. Tex. Health & Safety C. §482.181(a)(b).

the Board targeted Beck; that the Board directed this search be conducted; that the search included more than a search of his "records" which the Board regulations limited them to;[20] and that the search was conducted prior to the Board filing its complaint against Dr. Beck.

Clearly the only explanation for the Board's search was to retaliate against Petitioner for his suit against the Board for restricting his First Amendment rights to advertise his professional services. (App. L). Advertising by persons engaged in certain professions, such as dentistry, may be regulated but not prohibited. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), *rehearing denied*. But a state cannot prevent truthful advertisements concerning the availability and terms of routine processional services -- the flow of such information may not be restrained, and any attempt to do so is violative of the First Amendment. *Id.* Indeed, where a Board seeks to restrict such freedom of speech, it cannot rest

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[20] The scope of the search was also not properly limited as to Defendant Pitcock. 22 T.A.C. § 190.144 allowed only for "records" to be inspected -- however, the Texas Controlled Substances Act notice was *not limited to records*, enabling Defendant Pitcock, wholly without authority, to search the entire premises, including Dr. Beck's drug cabinet and its contents, and patient's financial records. Even under the Texas Controlled Substances Act, financial and pricing data requires written consent from the dentist -- consent which was not given by Petitioner. Tx. Civ. Stat. Art. 4476-15 §5.01(e). Moreover, this Act prohibits compelling a practitioner engaged in authorized medical practice from furnishing the name or identity of a patient to the Department of Public Safety, or to any other agency or public official. *Id.* at 5.02 (c).

Department of Business & Professional Regulation, 114 S. CT. 2084 (1994). The Board targeted Beck, in retaliation for asserting his First Amendment rights -- that is "how" the Board selected Petitioner for this particular search. (App. L, ¶'s 5, 6, 7, 8, 9, 10).

This analysis makes clear that Petitioner's Fourth Amendment Rights were violated by the July 7, 1986 search. As no constitutionally adequate substitute for a warrant was contained under either the Board regulations nor the Texas Controlled Substances Act, the inspection is only proper if 1) a warrant is sought pursuant to a plan based on sufficient specific neutral criteria; and 2) the warrant application adequately explains why an inspection of the particular establishment is within the program. *In re Trinity Industries*, 898 F.2d 1049, 1051(5th Cir. 1990), citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). It is undisputed that no warrant was ever sought or secured.

3. Defendant Pitcock Is Not Entitled to Qualified Immunity Since He Was Acting Not Within the Scope of His Discretionary Authority

The qualified immunity defense requires the *defendant official* to establish he was acting within his discretionary authority. *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982) (emphasis added), cert. denied, 460 U.S. 1012 (1983). Defendant Pitcock not only failed to establish under what authority he was acting, the evidence shows he was acting wholly without authority.

Defendant Pitcock had NO AUTHORITY under the Texas Controlled Substances Act to conduct the search of Dr. Beck's office. The Act clearly authorizes only officers or employees of the Texas Department of Public Safety selected

by the Director of the Texas Department of Public Safety to conduct "inspections." Absent from the record is any evidence indicating that Defendant Pitcock was an "officer" or "employee" of the Texas Department of Public Safety with "inspection authority" under the Texas Controlled Substances Act. This means that only Trooper Frank Perez may have had the authority to conduct an inspection.[21] Yet, Respondent's Second Motion for Summary Judgment avers that "Pitcock presented a Notice of Inspection to Plaintiff, and explained the purposes of the search" and that "Pitcock and the investigators were able to uncover several possible violations of the [Texas] Controlled Substances Act." (App. E at 72a). Pitcock had no authority to search Petitioner's office pursuant to the Texas Controlled Substances Act.[22]

Defendant Pitcock also had NO AUTHORITY under the Board's regulations. Pitcock only had authority to inspect Dr. Beck's records, and could only inspect those records upon making an appointment. 22 T.A.C. §109.144. It is undisputed that Pitcock made no appointment to inspect Dr. Beck's records. This means, Defendant Pitcock had NO AUTHORITY under the Board's regulations to search Petitioner's office, absent appointment, on July 7, 1986.

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[21] There is no evidence in Respondent's Motion for Summary Judgment of Officer's Perez' authority to conduct the search, nor any independent analysis of the reasonableness of the Texas Controlled Substances Act.

[22] Clearly, by involving Trooper Perez, the Board attempted to circumvent -- indeed exceed -- it's statutory authority, authority which was limited to inspecting records only upon appointment with the dentist. Importantly, *no charges were ever filed* by the DPS as a result of the warrantless search, because the search was a pretext solely for the benefit of the Board.

The Court of Appeals failure to analyze the two statutes at issue under *Barlow's* and *Burger*, resulted in the very warrantless search provisions this Court found unconstitutional in *Marshall v. Barlows, Inc.*, 436 U.S. 307 (1978), constitutional for purposes of the Fourth Amendment. It is undisputed that no warrant was ever presented to Dr. Beck at the time of the search. It is undisputed that the Board regulations (22 T.A.C. § 109.144(a)) did not authorize inspections without a warrant or its equivalent at the time the search of Dr. Beck's office was conducted -- allowing only record inspections "after and upon appointment with the dentist," (App. Q), and that the Board regulations did not require dentists to maintain their records accordance with the Texas Controlled Substances Act. 22 T.A.C. § 109.144(e). It is unclear, then, whether Petitioner was even subject to the Texas Controlled Substances Act. It is undisputed that Defendant Pitcock had no discretionary authority to conduct the search under either the Board regulations or the Texas Controlled Substances Act. It is undisputed that the Board revoked Petitioner's license based on evidence seized in the warrantless search. The only possible explanation for the Boards actions against Petitioner is that of retaliation -- retaliation for exercising his First Amendment right to advertise. This case is a textbook example of the need for a warrant as a safeguard in order to protect against the 'unbridled discretion [by] executive and administrative officers . . .'" *Barlow's* 436 U.S. at 323.

CONCLUSION

This Petition for a Writ of Certiorari should be granted. The Court of Appeals decision in this case is inconsistent with Supreme Court precedent. The Court of Appeals complete abrogation of a government officials

burden to prove any elements to establish the affirmative defense of absolute immunity in a summary judgment proceeding establishes a seriously flawed methodology with immediate adverse impact on immunity jurisprudence.

The Court of Appeals failure to apply the *Butz* functional approach to, or require any common law justification for, its grant of absolute immunity for acts of investigation by an alleged "quasi judicial" Board, effectively grants absolute immunity to quasi judicial actors for acts of investigation. Yet, this Court has found that acts of investigation performed by prosecutors are entitled only to qualified immunity.

Finally, the Court of Appeals failure to apply the *Barlow's* and *Burger* analysis has resulted in the Court of Appeals finding the Texas Controlled Substances Act warrantless search provision constitutional despite the fact that it lacks the same safeguards this Court found necessary in *Barlow's*.

This Court's ruling is necessary to ensure consistent and confident application of both the absolute and qualified immunity doctrines. As this Court has noted, "these doctrines are paramount to both the vindication of constitutional guarantees and the effective functioning of government." *Butz v. Economou*, 438 U.S. 478, 480-481 (1978).

/s/_____
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed March 3, 2000]

No. 98-51111

ROBERT LEE BECK, MD, DMD,
Plaintiff-Appellant,

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS; ET AL,
Defendants,

MICHAEL PITCOCK; WILLIAM S. NAIL; WILLIAM J. KEMP, DR; BRIAN BABIN, DR; JACK L. BOLTON, DR; RANDOLPH D. MINATRA, DR; FRANK SANTOS, DR; TERRY R. DICKINSON, DR; ROGER BYRNE, DR; CHARLES T. KU, DR; RONALD H. SHAMBLIN, DR,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before WIENER and STEWART, Circuit Judges*.

CARL E. STEWART, Circuit Judge:

This case involves a suit filed by a dental practitioner in the state of Texas against a state regulatory board and its members and staff. The plaintiff claims that the defendants improperly initiated disciplinary proceedings against him and revoked his dentistry license in an effort to retaliate against him from joining in a previous lawsuit filed by a group of dentists against the defendants. For the reasons stated below, we find that the board and its members are immune from liability under absolute immunity, and the board investigator Michael Pitcock is immune from liability under qualified immunity.

FACTUAL AND PROCEDURAL HISTORY

Robert Lee Beck ("Beck") has been a dental practitioner in Texas since 1967. In 1980, Beck joined with other dentists in a lawsuit against the Texas State Board of Dental Examiners (the "Board") contesting the Board's regulations against dentists advertising their services. The Board was composed of nine licensed dentists appointed by

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* Senior District Judge John M. Shaw of the Western District of Louisiana, was a member of the panel that heard oral argument on this case, but because of his death on December 24, 1999, he did not participate in this decision. This case is being decided by a quorum pursuant to 28 U.S.C. §46(d).

the Governor of Texas and was supported by several staff personnel. The Board was responsible for promulgating rules and regulating the dentistry profession in Texas. The lawsuit challenging the Board's regulations against advertising was resolved in favor of the plaintiffs.

In July 1986, Michael Pitcock ("Pitcock") and Wayne Youngblood ("Youngblood"), both staff members and investigators for the Board, accompanied Frank Perez, a Department of Public Safety ("DPS") agent, on an inspection of Beck's dental office. Pitcock stated in his deposition that information was forwarded to him alleging that Beck had ordered unusually high volumes of controlled substances. During the inspection, Beck was asked to produce documentation regarding his orders and prescriptions for controlled substances. The inspection revealed, inter alia, an unaccounted for shortage of certain controlled substances. The officers also discovered that Beck had self-prescribed drugs. Beck also failed to make available the necessary records for inspection. Based on these findings, a formal complaint was filed to revoke Beck's license.[1]

In 1987, the Board held a hearing to determine whether Beck's license should be revoked. Beck failed to attend the hearing. A plea of "untrue" was entered on Beck's behalf, and the Board conducted the hearing. After the presentation of evidence, the Board members unanimously voted to revoke Beck's license.

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[1] The complaint also alleged that Beck held a fellow dentist at gunpoint and orally threatened another fellow dentist.

After the Board's final order to revoke Beck's license was issued, Beck filed an action in state district court to contest the Board's ruling. While Beck's challenge to the Board's order was pending before state district court, the Board and Beck entered into an Agreed Judgment in April 1992. The Board agreed to conditionally reinstate Beck's license if he agreed to satisfy certain conditions. Beck satisfied the conditions and his license was reinstated.

Beck maintains that in 1992, Youngblood testified at a Sunset Committee that the Board targeted certain dentists for selective prosecution because of their participation in the lawsuit challenging the Board's regulations against advertising. Based on this information, Beck claims that the investigation of his dental practice and the disciplinary proceedings which led to the revocation of his license were based on improper retaliatory motivations.

In April 1994, Beck sued the Board, its members, and staff personnel (the "defendants") in their individual and official capacities in federal district court claiming violations of 42 U.S.C. § 1983, the Racketeer Influenced and Corrupt Organization Act ("RICO"), the Fourth Amendment of the United States Constitution, the Commerce Clause, and the Texas State Constitution. The defendants moved for summary judgment. The district court issued a mixed ruling in which it denied in part and granted in part the defendants' motion for summary judgment. The district court dismissed all of Beck's claims against the Board and the individual defendants in their official capacities. The district court also dismissed Beck's claims against several individual defendants named in his complaint, but preserved his claims against the remaining individual defendants named in the instant appeal. Beck

moved to file a second amended complaint, moved for relief from judgment, and moved to correct summary judgment. The district court denied Beck's motions. The remaining defendants filed a second motion for summary judgment to dispose of Beck's remaining claims. The district court granted the motion based on absolute immunity. Beck now appeals the district court's grant of the defendants' second motion for summary judgment. He also appeals the court's denial of his post-judgment motions.

STANDARD OF REVIEW

We review de novo, a district court's grant of summary judgment, applying the same standard as the district court in the first instance. See Burge v. Parish of St. Tammany, 157 F.3d 452, 465 (5th Cir. 1999). Summary judgment is appropriate where the moving party establishes that "there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." FED R. CIV. P. 50(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden. Celotex v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

Once the moving party has carried its summary judgment burden, the opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Thus, this showing requires more than some metaphysical doubt as to the material facts.

Matsushito Elec. Indus. Co v. Zenith Radio Corp., 475 U.S. 574, 584-86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

DISCUSSION

Beck argues that the district court erred when it granted summary judgment to the Board members and the Board's staff member, Pitcock. Specifically, Beck argues that the Board members are not entitled to absolute immunity because the Board members failed to demonstrate that they performed a quasi-judicial function when they initiated disciplinary proceedings to revoke his license. Beck also contends that Pitcock in his role as an investigator is not entitled to absolute immunity.

I. Board members

Beck argues that the record is insufficient to support the Board members' claim that they performed a "quasi-judicial" function regarding the disciplinary proceedings conducted against him. Specifically, Beck claims that the defendants failed to articulate facts sufficient to demonstrate they performed "quasi-judicial" functions under the factors set forth in Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). Beck additionally argues that the district court improperly invoked our decision in O'Neal v. Mississippi Board of Nursing, 113 F.3d 62 (5th Cir. 1997) (holding that state nursing regulatory board and its members were entitled to absolute immunity for performing quasi-judicial functions). The defendants, on the other hand, maintain that absolute immunity is applicable because the Board performed quasi-judicial functions. In the alternative, the defendants assert that qualified immunity is applicable

because the actions taken against Beck did not violate a clearly established constitutional right, and were not objectively unreasonable.

Before we discuss the merits of the absolute immunity issue, we find at the outset that Beck erroneously characterizes the burden of proof for summary judgment. Beck argues that the burden rests on the defendants to articulate facts to support their claim of immunity. Our well established summary judgment jurisprudence clearly shows otherwise. The moving party is not required to put forth evidence to meet its summary judgment burden for a claim of immunity. It is sufficient that the movant in good faith pleads that it is entitled to absolute or qualified immunity. See Salas v. Carpenter, 980 F.2d 299, 306 (5th Cir. 1992). "Once the [movant] asserts this affirmative defense, the burden shifts to the plaintiff to rebut it." Whatley v. Philo, 817 F.2d 19, 20 (5th Cir. 1987) (emphasis added). The movant can support its motion by solely relying on the pleadings. See Salas 980 F.2d at 299 (citing Celotex, 477 U.S. at 324, 106 S.Ct. at 2553). In the instant case, the defendants' motion for summary judgment asserted that they were entitled to absolute immunity because they performed quasi-judicial functions. As such, this assertion was sufficient to meet their summary judgment burden below. Having done so, the burden shifts to Beck to show that the defendants were not entitled to immunity.

As to the merits of the immunity issue, in a § 1983 action, the Supreme Court has recognized that a defendant may assert "absolute immunity." See Bogan v. Scott-Harris, 523 U.S. 44, 119 S.Ct. 966, 140 L.Ed.2d 79 (1999); Kalina v. Fletcher, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471

(1997). Absolute immunity prevents a person whose federal rights have been violated by a government official any type of remedy, regardless of the conduct. Because absolute immunity denies a plaintiff from obtaining redress for a constitutional violation in federal court, the Supreme Court has been "quite sparing" in recognizing absolute immunity. Forrester v. White, 484 U.S. 218, 224, 108 S.Ct. 538, 542, 38 L.Ed.2d *555* (1988). It is well settled that judges and prosecutors are entitled to absolute immunity. See Stump v. Sparkman, 435 U.S. 349, 355, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (judicial immunity); Imbler v. Pachtman, 424 U.S. 409, 430-31, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (prosecutorial immunity).[2]

Additionally, the Supreme Court has recognized that executive branch officials, when participating in a federal administrative agency's adjudicative process, are entitled to absolute immunity because they perform functions comparable to those of judges and prosecutors. See Butz, 438 U.S. at 512-13. Under Butz's "functional approach," the Court looks at the nature of the function performed, not the identity or title of the actor who performed it. See Buckley v. Fitzsimmons, 509 U.S. 259, 268, 113 S. Ct. 2605, 125

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[2] The essential rationale behind absolute immunity for judges is that, without protection from retaliatory suits, a judge would lose "that independence without which no judiciary can be either respectable or useful." See Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1871). As to prosecutors, entitlement flows from performance of activities that are intimately associated with the judicial process, such as initiating and prosecuting a criminal case. See Imbler, 424 U.S. at 430, 96 S.Ct. at 995

L.Ed.2d 209 (1993); see also Mays v. Sudderth, 97 F.3d 107, 110 (5th Cir. 1996). Thus, if a claim arises from a government or state agency performing "quasi-judicial" functions, the agency would be entitled to absolute immunity. In Butz, the Court identified a nonexhaustive list of factors to determine whether an agency and its members performed "quasi-judicial" functions, and thus are entitled to absolute immunity:

> (1) the need to assure that the individual can perform his functions without harassment or intimidation;
> (2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;
> (3) insulation from political influence;
> (4) the importance of precedent;
> (5) the adversary nature of the process; and
> (6) the correctability of error on appeal.

Butz, 438 U.S. at 512, 98 S.Ct. at 2913-14. No one factor is controlling.

In O'Neal v. Mississippi Bd. of Nursing, we applied the Butz factors and held that the members of a state nursing board were entitled to absolute immunity because the board and its members performed quasi-judicial functions. See 113 F.3d at 67. Beck essentially argues that the instant case is distinguishable from O'Neal because the presence of adequate safeguards is lacking. However, a review of the record reveals the contrary. When the Board revoked Beck's license in 1987, the dentistry profession in Texas was regulated under comprehensive statutory and administrative schemes. See

Tex. Rev. Civ. Stat. Ann. art. 4543 et seq.[3] and Tex. Admin. Code T. 22. Pt. V. Article 4548h provided procedures and guidelines for the revocation of dental licenses. Article 4548h required that the Board give the dentist adequate notice of the disciplinary hearing that includes the date, time, and place of the meeting at which the complaint is to be heard, and a copy of the complaint. Id. art. 4548h § 4. Furthermore, the dentist in question may present evidence to defend the allegations in the complaint. Id. The dentist may also be represented by counsel or an advocate. 22 T.A.C. § 107.21. The Board had subpoena powers to compel the production of evidence and the presence of those persons deemed to have knowledge that may assist the Board in reaching a proper decision. Tex. Rev. Civ. Stat. Ann. art. 4548h § 4. Additionally, if the Board issued an adverse ruling, the dentist had thirty days to appeal the decision to the state district court where the alleged offense occurred. Id. § 5. Furthermore, article 4548h § 5 provided that a dentist may apply for a supercedeas bond to stay the execution of the judgment and retain his license to practice until the appeal was resolved. As such, Texas' regulatory scheme embodied several safeguards that O'Neal and other courts have looked upon favorably. See O'Neal, 113 F.3d at 66 ("Procedural safeguards such as the right to counsel, adequate notice of a hearing, and the opportunity to present and cross-examine witnesses are all readily available to any person charged by the board."); Bettencourt v. Board of Registration in Medicine of the Commonwealth of Massachusetts, 904 F.2d 772, 783 (1st

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[3] In 1999, Tex. Rev. Civ. Stat. Ann. art 4543 et. seq. was repealed by Acts 1999, Leg., ch. 388, § 6(a), effective September 1, 1999.

Cir. 1990) (representation by counsel, written opinions, and the ability to introduce oral and documentary evidence "indicate that enough checks on malicious action by Board members exist to warrant a grant of absolute immunity for the Board members' actions in their adjudicatory capacities."); see also Mishler v. Clift; 191 F.3d 998, 1006 (9th Cir. 1999) (Nevada's statutory scheme reduces that need for private damages actions as a means of controlling unconstitutional conduct).

Beck nonetheless asserts that adequate safeguards were lacking because several members of the Board stated in their depositions that they were unaware that Pitcock, Youngblood, and the DPS officer inspected Beck's dental office prior to the disciplinary proceedings. Furthermore, Beck asserts that he did not receive adequate notice of the disciplinary hearing, that he was not present at the hearing,[4] that he did not have an opportunity to confront and cross-examine witnesses, that he had no attorney present, and that he did not have the opportunity to call witnesses. Nonetheless, the Board members are entitled to absolute immunity "from liability for [their] judicial acts even if [their] exercise of authority is flawed by the commission of grave procedural error." Stump v. Sparkman, 435 U.S. 349, 359, 98 S.Ct. 1099, *55* L.Ed.2d

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[4] The record appears to cut against Beck's claims. First, the defendants included as part of their summary judgment evidence copies of two notices that were sent to Beck which indicated the date, time, and purpose of the disciplinary hearing. Furthermore, an acknowledgment of receipt of the notices were entered into evidence at the disciplinary hearing. Thus, apparently Beck's absence at the hearing was voluntary and did not result from the Board's failure to give him an opportunity "to be heard."

331 (1978).[5] Thus, the inquiry is not whether the defendants committed error while executing the safeguards, but whether adequate safeguards existed. The summary judgment evidence supports a finding that adequate safeguards existed.

Additionally, the summary judgment evidence reveals that other Butz factors weigh in the Board members' favor. First, because the Board members were statutorily empowered to revoke, suspend and deny licenses, "it is important that [B]oard members [were able to] make these decisions free from the threat of incurring personal liability for every decision they hand[ed] down." O'Neal, 113 F.3d at 66. Second, as to isolation of political influence, the Board members were appointed by the Governor to six-year staggered terms, with the terms of one-third of the Board members expiring every two-years. See Tex. Rev. Civ. Stat. Ann. art. 4542. The board members in O'Neal were appointed under similar conditions and we observed that members "were independent [] and [were] under no pressure to resolve disputes in favor of one party or the other." 113 F. 3d at 66. Third, although the record does not reveal whether the Board abided by internal precedent, or precedent from the state or federal court, nevertheless, the absence of this factor is not dispositive.

Fourth, the disciplinary proceedings were adversarial in nature. The dentist was able to be represented by counsel,

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[5] Several Board members stated in their affidavits that it was standard practice for Board members to be unaware of administrative searches prior to the disciplinary hearings. Beck does not articulate how this practice deprived him of any recognized procedural due process rights.

22 T.A.C. § 107.21, and present evidence to defend against the charges. Tex. Rev. Civ. Stat. Ann. art. 4548h § 4. The hearings were conducted by a presiding officer who administered oaths to witnesses and made evidentiary rulings. Id. § 107.36.

Finally, as stated above, the Board's final order was appealable to a state district court Tex. Rev. Civ. Stat. Ann. art. 4548h § 5. As such, errors committed by Board members could have been redressed on review to the state district court. Therefore, application of the Butz factors to the instant case weighs in favor of a finding that the defendants performed a quasi-judicial function when they participated in the disciplinary proceedings in question. Because the defendants' role in the instant case is analogous to the board members' role in O'Neal, the district did not err when it cited O'Neal and granted summary judgment in favor of the Board members.

II. Michael Pitcock

A. Absolute Immunity

Beck argues that Pitcock, an investigator for the Board, is not entitled to absolute immunity.[6] Specifically, Beck maintains that Pitcock, a non-appointed staff member, functioned as an investigator rather than an adjudicator. To support this contention, Beck emphasizes that Pitcock had no

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[6] Beck argues that Pitcock's investigative conduct, namely the warrantless search of his dental office, violated his Fourth Amendment rights.

authority to adjudicate, no authority to prosecute or decide which cases were prosecuted, and no authority to present evidence. The court apparently rejected Beck's claim and granted summary judgment in favor of Pitcock based on absolute immunity.[7]

After a careful de novo review of the record, we find that the district court erred when it granted summary judgment to Pitcock based on absolute immunity. The record reveals that Pitcock performed investigative, not adjudicative nor prosecutorial functions. During the investigation and prosecution of Beck's case before the Board, Pitcock was an assistant director charged with overseeing the investigative section of the Board. He reported to William S. Nail ("Nail"), the executive director of the Board during Pitcock's disciplinary proceedings.[8] Nail summarized the role of the Board's staff investigators in his deposition as that of gathering information, such as documents, contacting witnesses, and contacting the dentist that was the subject of the investigation. Pitcock stated in his deposition that "[w]e complete the investigation and turn it over to the Board Secretary." He further, stated that "we would send in all the files to the Board Secretary and they would review the

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[7] The district court's one-page summary judgment order is not explicative nor is it accompanied by a memorandum of findings of facts or conclusions of law. Nevertheless, the order on its face declares that O'Neal was the basis for the court's decision. Because O'Neal mainly addressed the question of absolute immunity, we interpret the order as a grant of summary judgment based on absolute immunity.

[8] Nail was a non-appointed staff member of the Board.

investigations and make the decision."[9] The record does not show that Pitcock participated in the Board's adjudication of Beck. As such, we find that Pitcock performed only an investigative function.

This circuit has not squarely addressed whether an investigator for a state professional regulatory board is entitled to absolute immunity under Butz and O'Neal. By analogy, although a prosecutor is absolutely immune when she acts in her role as an advocate for the state by initiating and pursuing prosecution, see Burns v. Reed, 500 U.S. 478, 491, 111 S.Ct. 1934, 1942, 114 L.Ed.2d 547 (1991), or when her conduct is "intimately associated with the judicial phase of the criminal process," id. at 492, 111 S.Ct at 1942, she does not enjoy absolute immunity for her acts of investigation or administration. See Buckley v. Fitzsimmons, 509 U.S. 259, 273 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). In the instant case, Pitcock neither initiated nor pursued prosecution of the complaint against Beck. Thus, Pitcock's investigative activities are not covered under absolute immunity.

The defendants nonetheless argue that Pitcock enjoys absolute immunity because he was a staff member of the Board, and thus the umbrella of absolute immunity that covers the Board and the appointed members covers him as well. To support this claim, the defendants cite Bettencourt v. Board of

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[9] Under article Tex. Rev. Civ. Stat art. 4548h § 4, Secretary of Board was vested with the discretionary authority to determine whether a complaint filed against a dentist should be heard before the Board. Article 4543 provided that the Board elect a President and a Secretary of the Board from the nine members appointed to the Board.

Registration of the Commonwealth of Massachusetts, 904 F.2d 772 (1st. Cir. 1990). In that case, the plaintiff sued a state medical board and three staff members for alleged constitutional violations regarding the revocation of his medical license. The three staff members rendered legal advice to the board, assisted in the writing of the final order, and met with board members to determine the appropriate sanctions and punishment. Id. at 785. The First Circuit observed that these functions relate to the heart of the adjudicatory process, and thus the staff members were entitled to quasi-judicial immunity. Id. Our reading of Bettencourt indicates that the board's immunity did not ipso jure extend to the staff members but rather, the court conducted a factual examination of the staff members' functions and determined that they were entitled to quasi-judicial immunity. Thus, the staff members' quasi-judicial immunity existed independent of the board members' immunity.

In the instant case, Pitcock's role as an investigator was not at the heart of the adjudicative process. Pitcock states in his deposition that he played no role in deciding whether to commence disciplinary proceedings against Beck. He did not help draft the final order, nor did he advise the Board as to the appropriate sanction. As established above, Pitcock's own words best describe his role when he stated, "we just investigate the facts and let the Board secretary make the decision." Therefore, under these circumstances, the district court erred when it invoked O'Neal and granted summary judgment to Pitcock because he did not perform either an

adjudicative or prosecutorial function, and thus is not entitled to absolute immunity.[10]

B. Qualified Immunity

The defendants in the alternative argue that Pitcock is entitled to qualified immunity. Specifically, the defendants contend that Pitcock and the DPS's search of Beck's dental office was a valid administrative search.

Government officials performing discretionary functions are protected from civil liability under the doctrine of qualified immunity if their conduct violates no "clearly established statutory or constitutional fights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); Sorenson v. Ferrie, 134 F.3d 325, 327 (5th Cir. 1998). Claims of qualified immunity are reviewed

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[10] The defendants' analogy of Pitcock's role to a probation officer who prepares a presentence report also is not persuasive. The preparation of a presentence report is a narrow function that is "intimately associated with the judicial phase of the criminal justice process." Spaulding v. Neilsen, 599 F.2d 728, 729 (5th Cir. 1979). As established above, Pitcock's role was not intimately associated with the Board's adjudication of Beck.

Furthermore, we reject Beck's argument that Pitcock functioned as a complaining witness. Beck falls to point to any evidence that suggest that Pitcock initiated the complaint against Beck. Furthermore, Beck does not show that Pitcock swore to the truthfulness of the allegations in the complaint. Cf. Kalina, 522 U.S. 118, 118 S.Ct 502.

under a two-step analysis. The first question is whether the plaintiff has asserted the violation of a clearly established constitutional right. If so, the court decides whether the defendant's conduct was objectively reasonable. Coleman v. Houston Indep. Sch. Dist., 113 F.3d 528, 533 (5th Cir. 1997).

The summary judgment evidence reveals that Pitcock's inspection of Beck's office did not violate clearly established constitution or statutory rights. Warrantless searches are presumptively invalid Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 2306 & n. 4, 110 L.Ed.2d 112 (1990). However, administrative or regulatory searches are exceptions to the warrant requirement. New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 2644, 96 L.Ed.2d 601 (1987). Such warrantless searches are constitutional only (1) if there is a substantial governmental interest that informs the regulatory scheme pursuant to which the inspection is made, (2) if warrentless inspections are necessary to further the regulatory scheme, and (3) if the inspection program provides a constitutionally adequate substitute for a warrant, in terms of certainty and regularity of its application. Id.

In the instant case, the regulation and monitoring of the use of controlled substances, particularly in the dentistry industry, is a substantial state interest. Furthermore, the inspection was conducted pursuant to two then coexisting regulatory schemes. Under the Texas Administrative Code, records and documents in dental offices were subject to on-site inspections. 22 T.A.C. § 109.144 ("§ 109.144" or "Section 109.144"). The inspection of Beck's office was also

conducted pursuant to the Texas Controlled Substance Act. Texas Civ. St. Art. 4476-13 to Art. 4476-15.[11]

Beck nonetheless argues that the search was not conducted pursuant to a regulatory scheme, but rather the search was conducted for purposes of uncovering criminal activity. To support his claim, he points out that during the inspection Pitcock was accompanied by a law enforcement officer from the controlled substance division of the DPS. Furthermore, Pitcock stated in his deposition that he suspected Beck of criminal activity regarding the improper use of controlled substances. Pitcock stated that he was concerned that Beck was ordering unusually high volumes of controlled substances. Thus, Beck essentially maintains that the search was illegal because it was motivated by suspicions of criminal wrongdoing.

Nonetheless, the Supreme Court rejected a similar argument in United States v. Villamonte-Marquez when the Court upheld an administrative search of a vessel for marijuana even though U.S. Customs agents were accompanied by state law enforcement officers, and were following an informant's tip that the ship was carrying contraband. See 462 U.S. 579, 584, 103 S.Ct. 2573, 77 L.Ed.2d 22, n.3 (1983) (discussing Scott v. United States, 436 U.S. 128, 135-139, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). Furthermore, we observed that "[a]dministrative searches conducted pursuant to valid statutory schemes do not

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[11] Texas Civ. Stat. Art. 4476-13 to Art. 4476-15 were repealed by Acts 1989, 71st Leg., ch. 678, S 13(1), effective Sept. 1, 1989.

violate the Constitution simply because of the existence of a specific suspicion of wrongdoing." United States v. Thomas, 973 F.2d 1152, 1155. (5th Cir. 1992). Thus, Pitcock's suspicions of Beck did not render the administrative search unreasonable.

Finally, the inspection programs provided an adequate substitute for a warrant. Although the present version of § 109.144 provides that inspections may be conducted "on demand," § 109.144 did not contain the "on demand" language when Beck's office was inspected. Section 109.144 was subsequently amended to include the "on demand" language. As such, Beck argues that the inspection was improper because neither Pitcock nor the DPS officer that conducted the search gave him prior notice of the inspection. However, section 5.01(c) of the Controlled Substances Act ("§ 5.01(c)") in pertinent part provided that officers ". . . shall have the right to enter premises and conduct such inspection at reasonable times upon stating his purpose and presenting to the owner, . . . of the premises appropriate credentials and written notice of his inspection authority." Thus, § 5.01(c) did not require that prior notice be given. The summary judgment evidence includes a copy of the notice of inspection that was given to Beck when Pitcock and the DPS officer arrived to Beck's office to the conduct the search.

Thus, under these circumstances, Beck does not show a violation of a clearly established constitutional right. Having failed to do so, we hold that Pitcock was entitled to qualified immunity.

CONCLUSION

We AFFIRM the district court's granted of summary judgment in favor of the Board members based on absolute immunity, and AFFIRM summary judgment in favor of Michael Pitcock, albeit based on qualified rather than absolute immunity. Accordingly, the district court's denial of Beck's post-judgment motions are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed November 3, 1998]

No. SA-94-CA-279 HG

ROBERT LEE BECK, M.D., D.M.D.,
Plaintiff,

v.

THE TEXAS BOARD OF DENTAL EXAMINERS, et al.,
Defendants.

ORDER

On this day came on to be heard Defendants' Response to Plaintiff's Motion for Relief from Judgment or in the Alternative, Motion to Correct Summary Judgment and Plaintiff's Motion for Leave to Introduce Documentary Evidence in Support Thereof.

The Court having considered the motions and the response finds Plaintiff' s Motion for Relief from Judgment or in the Alternative, Motion to Correct Summary Judgment and

Plaintiff's Motion for Leave to Introduce Documentary Evidence in Support Thereof should be DENIED.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Relief from Judgment or in the Alternative, Motion to Correct Summary Judgment and Plaintiff's Motion for Leave to Introduce Documentary Evidence in Support Thereof is hereby DENIED.

IT IS SO ORDERED. Signed this 3rd day of November, 1998.

/s/_____
H.F. GARCIA
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed July 31, 1998]

No. SA-94-CA-279 HG

ROBERT LEE BECK, M.D., D.M.D.,
Plaintiff,

v.

THE TEXAS BOARD OF DENTAL EXAMINERS, et al.,
Defendants.

ORDER

On this day, the Court considered Defendants' Second Motion for Summary Judgment. The Court, having considered said motion and the brief in support thereof, finds that the motion should be GRANTED. The basis for the Court's decision may be found in *O'Neal v. Mississippi Board of Nursing*, 113 F.3d 62 (5th Cir. 1997).

IT IS THEREFORE ORDERED that Defendants' Second Motion for Summary Judgment be GRANTED, and

Plaintiff's claims against the Defendants are hereby DISMISSED WITH PREJUDICE. All pending motions are DISMISSED AS MOOT, and the Clerk of the Court is ordered to close this case.

Signed on this the 31st day of July, 1998.

/s/_____
H.F. Garcia
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed August 13, 1998]

No. SA-94-CA-279 HG

ROBERT LEE BECK, M.D., D.M.D., *Plaintiff*,	)
v.	)
DR. BRIAN BABIN, DR. L. JACK BOLTON, DR. ROGER BYRNE, DR. TERRY R. DICKINSON, DR. WILLIAM J. KEMP, DR. CHARLES T. KU, DR. RONALD SHAMBLIN, DR. RANDOLPH D. MINATRA, WILLIAM S. NAIL, MICHAEL PITCOCK, DR. FRANK SANTOS *Defendants.*	)

PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT or in the alternative, MOTION TO CORRECT SUMMARY JUDGMENT and PLAINTIFF'S MOTION FOR LEAVE TO INTRODUCE DOCUMENTARY EVIDENCE IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Plaintiff, ROBERT LEE BECK, by and through his Attorney of Record, ROBERT J. BARRERA, and pursuant to Rule 60(b), Fed. R. Civ. Proc. files this his Motion for Relief From Judgment/Motion to Set Aside Summary Judgment and Plaintiff's Motion for Leave to Introduce Documentary Evidence and Brief in support thereof, and would respectfully show the Court as follows:

I.

The Plaintiff would show on the 31st day of July, 1998, the Honorable Court signed an Order granting the Defendant's Second Motion for Summary Judgment. The basis for the granting of the Motion was the case of O'Neal v. Mississippi Board of Nursing, 113 F.3rd. 62 (5th. Cir. 1997). The Plaintiff would assert that: (1) the Defendant's failed to factually plead the evidence necessary to prove the application of the doctrine of absolute immunity to the Defendants generally; and (2) assuming arguendo that the doctrine of absolute immunity is applicable to the Board and the executive director, William Nail, there is no factual or legal basis to support its application to the Defendant **Michael Pitcock** who was merely an investigator.

The Plaintiff would show that through mistake the Defendant **Michael Pitcock** was labeled as a "former executive director" (See Exhibit N, pp. 2,4) of the Board when in fact he was only an employee of the Board (See Exhibit F, p.7, L1. 20-25) and never an executive director. (See Exhibit F, p.11, L1. 12-13) The Court articulated its reliance on the case of O'Neal v. Mississippi Board of Nursing as the basis for the granting of the Motion for Summary Judgment. The Plaintiff would show that but for the mislabeling error in the pleadings the evidence in the record clearly shows that the Defendant **Michael Pitcock** clearly falls outside the guidelines of both O'Neal and Butz v. Economou, 438 U.S. 478 (1978). As the "executive director" in O'Neal was included under the Doctrine of Absolute Immunity, the Court in the instant case may have been affected by the mislabeling of the Defendant **Pitcock** who otherwise does not qualify for a grant of absolute immunity.

As a result of the foregoing, the Plaintiff would move for leave to show the Court evidence of the above through the attached exhibits.

II.

PROCEDURAL HISTORY

For purposes of brevity, the Plaintiff hereby adopts as if set forth herein verbatim the Procedural History of the Defendant's Second Motion for Summary Judgment with the exception that the Plaintiff's would assert that the issue of "qualified immunity" has already been before this Court and has been determined not to apply to the Defendants in their individual capacities and is therefore moot. (See Exhibit E).

The Plaintiff admits that the issue of "absolute immunity" had never been addressed by this Court. As stated above, the Court granted the Second Motion for Summary Judgment applying the doctrine of "Absolute Immunity" to all of the Defendants in the case.

III.

FACTUAL BACKGROUND

The Plaintiff hereby adopts the Defendants' Factual Background as set forth in the Second Motion for Summary Judgment with the exception that the Plaintiff has been licensed since 1965 and not 1967 as indicated therein. Further, the Plaintiff hereby specifically denies each of the "findings" alleged on page 3, subparagraphs 1) thru 8). The Plaintiff did not receive proper notice of the hearing. (See Exhibit O, p. 339, L1. 3-17) Further, while the facts may have been uncontroverted due to the absence of the Plaintiff, the findings of the Board Order (Exhibit A) and the evidence (Exhibit B) are certainly contradictory and do not support each other. (See Exhibit H). Further, the knowledge of the actions regarding the retaliatory Motives of the Defendants' was not limited to the Sunset Hearings referenced therein. Plaintiff denies that he has not presented any colorable claims.

As part of the factual background, and for purposes of distinguishing the application of the doctrine of absolute immunity, the Defendant Michael Pitcock was never a member of the Dental Board or its Executive Director. (Exhibit I) . During the relevant times mentioned in the Plaintiff's Second Amended Complaint, the Defendant Pitcock acted in the capacity as an investigator, (See Exhibits J and F,

p.19, L. 3; p. 20, L1. 18-19) had no judicial or quasi-judicial authority, had no authority to adjudicate, had no authority to prosecute or decide which cases were prosecuted, and had no authority to present evidence. (See Exhibit F, p.19, L. 3, p. 20, L1. 18-19) The attached exhibits support each of these factual averments.

III.

The Plaintiff hereby adopts the Summary Judgment Standard legal arguments as set forth therein by the Defendant and adopts said arguments and case law as if fully set forth herein. Further, the Plaintiff would assert that the he has raised a fact issue concerning all of the Constitutional violations alleged and that the Summary Judgment should have been denied.

IV.

JUDGE OR PROSECUTOR?

In the many cases cited herein reflecting opinions of the Federal Courts on quasi-judicial immunity, all share the common characteristic of observing that quasi-judicial immunity applies to officials functionally comparable to judges or prosecutors. As the movant for the application of absolute immunity, Defendants should have presented evidence to the Court that they were acting either as prosecutors or judges in revoking Plaintiff's dental license. However, the uncontroverted evidence in this case regarding the Defendant **Michael Pitcock** is that he participated in the investigation of the Plaintiff and oversaw the gathering of

evidence against Plaintiff by other investigators. (See Exhibit F, p. 100, L1. 12-16)

The Plaintiff would further assert that the Defendant Pitcock falls totally outside the scope of the absolute immunity defense as established by Butz. He is neither judge nor prosecutor and as such does not fall within the ambit of protections as contemplated by the rarely applied defense of absolute immunity. Butz, at 510, 98 S.Ct. 2894, 2912, and O'Neal, at 65. The Defendant Pitcock is not a "Board" member, he is not an appointee of the Governor, he is not an "executive director", he has no power to adjudicate or punish the violation of any regulations of the Dental Practices Act, nor does he "present" evidence before the Board for disposition as an attorney does. The Defendant Pitcock was simply an employee of the Board. (See Exhibit F, p. 7, L1. 20-25)

In the words of the Defendant Pitcock, his function at the time which he entered the office of the Plaintiff for purposes of the criminal search was to "oversee the investigative section of the Dental Board" though his title was "Assistant Director". (See Exhibit F p. 11, L1. 24,25 and p. 11, Ll. 1-8). He functioned as an investigator and in fact was the "Senior Investigator". (Exhibit F, p. 11, l. 24.). Further, he specifically stated that "all he did was investigate", that he was the director of "enforcement or security", that he was there in a law enforcement or regulatory capacity, and the he just "investigate(d) and let the Board Secretary make the decision". (Exhibit F, p. 11, L. 24, p. 14, L1. 1-5, L1. 22-23, p. 20, L1. 15-19). Finally, in the words of the Defendant himself, he was "not the judge. I just investigated." (See Exhibit F, p. 93, 11. 10-19). "I'm

just an investigator, a cop, you know." (See Exhibit F, p. 122, 11. 19, 20) He specifically removed himself from the "quasi-judicial" element which is so paramount to the application of absolute immunity. O'Neal p. 65. Pitcock did not have the authority to administer oaths nor to compel the attendance of witnesses. He could not and did not have the authority to present evidence nor call witnesses as a prosecutor does. He could not regulate the course of any hearings nor rule on the admission of evidence. He exercised no "discretion," in the presentation of evidence. And finally, he had no "fact finding" authority which is paramount to any finding of "quasi-judicial, immunity. Butz, at 513, 514. (See Exhibit F, p. 141, L1. 16-24; p. 142, Ll. 1-3)

Therefore, while Pitcock held the title of an "assistant director" he functioned more like a policeman who is not entitled to a defense of absolute immunity but only to the defense of qualified immunity. Pierson v. Ray, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218. The Court has already ruled that this defense is a fact issue for the jury (See Exhibit E). The Plaintiff would assert that the Defendant's attempt to include the Defendant Pitcock under the umbrella of absolute immunity is untenable and the Motion for Summary Judgment should be denied as to this Defendant.

VI.

In support of the Defendant Pitcock's role as a policeman investigator rather than a "quasi-judicial" official, the Plaintiff's Second Amended Complaint shows that on July 7, 1986, the Defendant **Michael Pitcock** conducted an unauthorized and warrantless search of Dr. Beck's dental office in San Antonio. (Exhibit G) The specific purpose of

the search was to obtain evidence of criminal activity. (Exhibit F, p. 48, Ll. l-19, p. 49, L1. 3-15). This criminal search was conducted by Michael Pitcock and Wayne Youngblood of the Texas State Dental Board with the assistance of Trooper Frank Perez of the Texas Department of Public Safety. The Defendant Pitcock acknowledged in deposition testimony that it was not necessary to have DPS Trooper Perez present, but that Perez was there for the purpose of investigating criminal activity which the State Dental Board was not authorized to prosecute or investigate. (Exhibit F, p. 48, Ll. l-19, p. 49, L1. 3-15). Trooper Perez was acting as a peace officer for and on behalf of the State of Texas and acting under color of law.

This acknowledgement by Pitcock, evidences a criminal investigation was contemplated and was executed on the pretext of an administrative search and review of Dr. Beck's patient records. This is a clear violation of the Plaintiff's IVth Amendment right to be free from an unreasonable search and seizure. See *United States Constitution IVth* Amendment. More specifically, the Defendant Pitcock purposely failed to obtain a criminal search warrant with full knowledge that his intent was to do a "criminal" investigation. (Exhibit F, p. 48, Ll. l-19, p. 49, L1. 3-15).

The Plaintiff has stated with factual particularity the Constitutional right to be free from unreasonable searches and has plead the specific facts setting forth not only the conduct which violated that right, but the specific knowledge of the Defendants who conducted the search, which evidence clearly shows that a reasonable person would have known that the conduct alleged would violate Plaintiff's Constitutional rights.

Further, there is no showing in any pleading or Summary Judgment proof that Defendant Pitcock falls within the protections contemplated by either O'Neal or by Butz and therefore Pitcock should not be granted absolute immunity.

ABSOLUTE IMMUNITY CLAIM

The Defendants generally claim that they are entitled to absolute immunity from liability due to their status as members of a "medical/health professional board." Defendant's reliance on Butz v. Economou, 438 U.S. 478, 511-517, 98 S.Ct. 2894, 2913-2916 (1978) as authority for their position is unsupported by the Supreme Court's reasoning in that case. The key to a Butz determination of absolute immunity is a review of the "functions" of the relevant official. Butz and its progeny specify a of the relevant official. Butz and its progeny specify a multi-pronged analysis to be applied to the officials in question, which will determine their entitlement to this rare form of immunity of which the Court has been "quite sparing" in its application. O'Neal v. Mississippi Board of Nursing, 113 F.3d 62, 65 (5th Cir. 1997).

The Circuit Courts have routinely noted when addressing claims of absolute immunity that the Supreme Court is "quite sparing" in its grants of such immunity. Forrester v. White, 484 U.S. 219, 108 S.Ct. 538 (1988). Indeed, in the Butz opinion, the Supreme Court states that ". . . a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations . . ." Butz, 438 U.S. 478, at 508. Because absolute immunity is so sparingly applied the Supreme Court undertakes "a considered inquiry into the

immunity historically accorded the relevant official at common law and the interest behind it" Butz, 438 U.S. 478, at 508. The focus of the inquiry is whether or not the Defendants in their individual capacities are "quasi-judicial agency officials who, irrespective of their title, perform functions essentially similar to those of judges or prosecutors, in a setting similar to that of court. Bettencourt v. Bd. Of Reg. In Medicine, 904 F.2d 772, 782 (1st Cir. 1990).

Defendants assert at page 6 of their Second Motion for Summary Judgment that their "quasi-judicial" status is undisputed, when in fact, it cannot have been established prior to an inquiry which would grant it. In fact, Defendant's assertion that they are "quasi-judicial" officials because of their status as Board Members flies in the face of everything Butz stands for. As the Court is well aware, pleadings are not evidence. The Defendants have relied totally upon their "title" as the basis for the application of absolute immunity to them as Defendants. The Defendants have failed to prove by Summary Judgment evidentiary standards that they qualify for absolute immunity as they have failed to show by affidavit or otherwise that they "functioned" in a quasi-judicial role or that they meet any of the standards of the Butz test. Therefore, a determination that defendants are entitled to quasi-judicial immunity require an analysis of their functional comparability to judicial officers and of factors characteristic of the judicial process. Butz, at 508, 509. This requires evidence which the Defendants have not attached to their Motion and which does not appear of record.

An official is entitled to absolute immunity if:

(1) the official's judgments are functionally comparable to those of a judge;

(2) the nature of the controversy in which the official is forced to become a participant is sufficiently intense that there is a realistic prospect of continuing harassment or intimidation by disappointed litigants; and

(3) the system in which the official operate contains safeguards adequate 'to reduced the need for private damage actions as a means of controlling unconstitutional conduct,' including insulation from political influence, adversarial proceedings, a written record including the decisionmaker's findings and conclusions, and the correctability of error on appeal.

Eisenberg v. Sternberg, 641 F. Supp. 620 (W.D. Wis. 1986), citing Butz, 438 U.S. 478, at 512; Cleavinger v. Saxner, 174 U.S. 192, 106 S.Ct. 496 (1985).

The Plaintiff would assert that there is no evidence in the Motion for Summary Judgment which would prove that the Defendants have shown themselves entitled to rely upon this "rarely applied" doctrine.

Further, it is clear that there is no evidence of "adequate procedural safeguards" and as a result, the Defendants do not meet the third prong of the Butz test. Lack of safeguards alone is sufficient to defeat a claim of absolute immunity. Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975), Cleavinger v. Saxner, 474 U.S. 193, 106 S.Ct. 496 (1985).

Defendants have failed to allege precisely what safeguards were in effect which protected Plaintiff's rights. "Officials who seek absolute immunity must squarely shoulder the burden of showing that public policy demands an exemption of that scope" Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1992).

The Defendant's have the burden of justifying their claim of absolute immunity in light of overriding considerations of public policy. Forrester v. White, 484 U.S. 219, 108 S.Ct. 538 (1988). Therefore, Defendants must articulate to the Court the basis for their claim that they have met the Butz requirements and must identify those portions of the record which show absence of material fact as to Defendant's meeting the strict requirements of the granting of absolute immunity. The Circuit Court opinions regarding medical/healthcare boards referred to in Defendant's Second Motion for Summary Judgment each contain an extensive factual discussion of the safeguards in place for each board in question, based on the boards' assertions and proof of the details and extent of those safeguards. See, e.g., Bettencourt v. Bd. Of Reg. In Medicine, 904 F.2d 772, 782 (1st Cir. 1990), Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1992). In the instant case there are none.

The Defendants cannot demand Summary Judgment without having met their burden with regard to the third Butz test. In fact, the record reflects that Plaintiff was afforded none of the procedural safeguards discussed in the cases. Plaintiff did not receive adequate notice of the hearing, was not present at the hearing wherein Defendants revoked his dental license, he did not have the opportunity to confront and cross-examine witnesses, had no attorney present to represent him, and there is no indication that he had the opportunity to call or question any witnesses. (See Exhibit G).

ABSOLUTE IMMUNITY CONCLUSION

While multiple Circuit Courts have held that medical/health profession boards similar to Defendant's Board have been entitled to absolute immunity, the Supreme Court makes it clear in Butz that each grant of immunity is a factual determination to be clearly weighed according to the functions served by the officials and the safeguards in place to protect the property interests of individuals subject to their rulings. If the Butz case stands for anything, it is that no grant of immunity is automatic based on positions or titles. Defendants have simply and wholly failed to prove by Summary Judgment evidence that a grant of absolute immunity should apply to them. Accordingly, their Second Motion for Summary Judgment with respect to absolute immunity should be denied.

WHEREFORE PREMISES CONSIDERED; the Plaintiff respectfully prays that in light of the attached evidence in support of this Motion, the Court grant leave to Plaintiff to admit the attached Exhibits; find that the doctrine of Absolute Immunity is inapplicable to the Defendant

Michael Pitcock and set aside the Summary Judgment as to him in particular; and reconsider the Court's granting of the Summary Judgment to all of the Defendants and set same aside in light of the failure of Defendants to prove their qualifications therefore.

Respectfully submitted,

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Exhibit B:	Complaint and Docketed Complaint dated 11-06-87
Exhibit C;	Affidavit of Youngblood dated 02-22-95
Exhibit D:	Deposition of Youngblood dated 05-09-97
Exhibit E:	Report and Recommendation of the Magistrate
Exhibit F:	Deposition of Michael Pitcock dated 02-25-97
Exhibit G:	Affidavit of Robert L. Beck dated 08-13-98
Exhibit H:	Affidavit of Santos Serna, Jr. dated 07-28-97
Exhibit I:	Copy of Letter dated 07-09-86 to Dr. Robert Beck
Exhibit J:	Copy of Investigation Report dated 07-08-86
Exhibit N:	Plaintiff's Second Amended Complaint dated 05-27-98
Exhibit O:	Deposition of Robert L. Beck dated 02-20-97
Exhibit P:	Copy of Letter dated 12-02-87 to Dr. Robert Beck

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed July 6, 1998]

No. SA-94-CA-279

ROBERT LEE BECK, M.D., D.M.D., *Plaintiff*,	)
v.	)
THE TEXAS BOARD OF DENTAL EXAMINERS, et al., *Defendants*.	)

DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT WITH BRIEF IN SUPPORT

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT LEE BECK, M.D., D.M.D.	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO.
	)	SA94CA0279
THE TEXAS STATE BOARD OF DENTAL EXAMINERS; ET AL.	)	
Defendants	)	
	)	

DEFENDANT' SECOND MOTION FOR SUMMARY JUDGMENT WITH BRIEF SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Defendants Dr, Brian Babin, Dr. L. Jack Bolton, Dr. Roger Byrne, Dr. Terry R. Dickinson, Dr. William J. Kemp, Dr. Charles T. Ku, Dr. Randolph D. Minatra, William S. Nail, Michael Pitcock, Dr. Frank Santos, and Dr. Ronald H, Shamblin (Defendants), in the above-styled and numbered civil action and file this their Second Motion for Summary Judgment with Brief in Support, as follows:

I.

PROCEDURAL HISTORY

On April 1, 1994, Plaintiff filed his Original Complaint against the Texas State Board of Dental Examiners (TSBDE) and forty current or former TSBDE board members and executive directors (Defendants). The majority of Plaintiff's original claims were brought pursuant to 42 U.S.C. § 1983. Plaintiff also brought claims under RICO, the Texas Constitution and the Commerce Clause of the United States Constitution.

On February 10, 1995, Defendants' filed their Original Motion for Summary Judgment, primarily focusing on the defense of limitations. On August 1, 1995, this Court granted in part Defendants' First Motion for Summary Judgment, dismissing all claims against the Board and the individual defendants in their official capacities. This Court also dismissed several of the causes of action originally asserted by Plaintiff, and dismissed several of the original individual defendants based upon their entitlement to qualified immunity. Specifically, this Court dismissed the Fourth Amendment claims against Defendants Byrne, Ku, and Shamblin on the basis of their qualified immunity. Furthermore, this Court dismissed Plaintiff's deprivation of property rights under the Fifth and Fourteenth Amendment against Defendant Babin on the basis of qualified immunity. Thereafter, Plaintiff filed his Second Amended Complaint on May 27, 1998. It is in response to Plaintiffs Second Amended Complaint, and solely on the basis of their entitlement to absolute and qualified immunity, that the remaining defendants now file this Second Motion for Summary

Judgment. The court has not until this motion had the opportunity to address the substance of the Defendant's assertions of absolute and official immunity. The immunity issue has not until this motion been before this honorable Court.

II.

FACTUAL BACKGROUND

Plaintiff has been a dental practitioner in the State of Texas since 1967. In 1980, Plaintiff joined with other dentists in a lawsuit contesting their right to freely advertise.[1] The lawsuit was resolved, and dentists were then given the right to advertise.

On July 7, 1986, Defendant Pitcock accompanied Frank Perez, a Department of Public Safety agent, and Wayne Younbgblood, a TSBDE investigator, on a search of Plaintiffs's office. (Exhibit A). The results of that search culminated in TSBDE finding, on November 6, 1997, that:

1) Plaintiff's records, at the time of the search, revealed a shortage of Valium (a powerful depressant and controlled substance); and
2) Plaintiff failed to make necessary records available for inspection; and

---

[1] The lawsuit was captioned *Akin v. Texas State Board of Dental Examiners,* Cause No. 301132. It was filed in District Court in Travis County.

3) Plaintiff, over a five-month period, self-prescribed 2500 Empirin tablets with codeine, a powerful narcotic and controlled substance; and
4) Plaintiff self prescribed drugs which were not necessary; and
5) Plaintiff's records revealed an unaccounted shortage of Seconal tablets also a powerful narcotic and controlled substance; and
6) Plaintiff held a fellow dentist at gunpoint until certain papers were signed; and
7) Plaintiff placed a fellow dentist in fear of his life by verbal threats; and
8) Plaintiff dishonorably violated standards of professional and ethical conduct.

(Exhibit P). Due to the Board's findings, Plaintiff's dental license was revoked. (Exhibit P). Plaintiff received notice of the hearing, yet failed to attend and offer any sort of defense to the allegations brought against him. (Exhibit V and Exhibit W) Because the facts were uncontroverted at the hearing, the board members unanimously agreed that their only option was to revoke Plaintiff's license. (Exhibit P).

After Plaintiff filed suit contesting the revocation of his license, the TSBDE and Plaintiff entered into an Agreed Board Order in April, 1992, conditionally reinstating his license if Plaintiff satisfied several Board imposed conditions.

(Exhibit B).[2] Plaintiff agreed to the conditions set forth in the Board Order and has so far abided by them, Consequently, Plaintiff's Dental License was reinstated.

Plaintiff now asserts that his license was initially revoked because the TSBDE was retaliating against him for advertising. Plaintiff alleges that during Sunset Committee hearings concerning the TSBDE, he was made aware that all of Defendants actions towards him were in response to adverting and participation in the earlier lawsuit.

Ignoring the abundance of evidence supporting the propriety of Defendants' actions with regard to Plaintiff's license and without apparent concern for the actual involvement of each Defendant in the investigation and subsequent proceedings, Plaintiff has not presented any colorable claims.

III.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317,

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[2] Conditions included education, training, mailed apologizes to threatened doctors, community service etc. *see,* (Exhibit B).

106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). The substantive law governing the suit identifies the elements of the nonmoving party's claims or the moving party's defense and, hence, which facts are material. *Anderson,* 106 S.Ct at 2510.

The dispute about a material fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" on that issue. *Id.* To meet the requirements of genuineness, the nonmoving party "must set forth specific facts showing there is a genuine issue for trial." *Id.* at 2511 *(citing First National Bank of Arizona v. Cities Service Co.*, 88 S.Ct. 1575 (1968)). Conclusory allegations or general denials are insufficient to preclude summary judgment. *Id.* Further-more, summary judgment evidence must be of the form that would be admissible at trial, since it is subject to the same rules governing admissibility. *Lavespere v. Niagara Machine & Tool Works, Inc.*,, 910 F.2d 167, 175-76 (5th Cir. 1990), *reh'g. denied,* 920 F.2d 259 (5th Cir. 1990)

The party seeking summary judgment "bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 323, 106 S.Ct. at 2554. "The burden on the moving party (for summary judgment) may be discharged by 'showing' – that is pointing out to the district court – that

there is an absence of evidence to support the nonmoving party's case." *Id.*, at 2554.

A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the Plaintiff's case. *International Ass'n of Machinists Aerospace Workers Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). The nonmoving party "must [then] set forth specific facts showing there is a genuine issue for trial." *Anderson,* 106 S.Ct. at 2510.

IV.

ARGUMENT AND AUTHORITIES

A. Defendants are Entitled to Absolute Immunity

The Supreme Court has recognized that the duties of some governmental officials require absolute exemption from liability. They include so-called "quasi-judicial" officials whose duties are substantially the same as judges and prosecutors and who operate in what amounts to a judicial setting. *O'Neal v. Mississippi Board of Nursing, et al,* 113 F.3rd 62, 654 (5th Cir. 1997); *citing, Butz v. Economou,* 438 U.S. 478, 511-017, 98 S.Ct. 2894, 2913-16 (1978). It is not disputed that the Board functions as a judicial body and was so acting with regard to the Plaintiff. The Fifth Circuit has affirmed grants of absolute immunity for medical/health profession boards and their members for claims arising from their quasi-judicial functions. *See O'Neal,* 113 F.3rd, at 67. In so holding, the Court of Appeals was persuaded by grants of absolute immunity in the medical/healthcare Board setting

by three sister United States Circuit Court of Appeal. *Id.* Because the Defendants in the case at bar were quasi-judicial actors with regard to the Plaintiff they are entitled to absolute immunity from Plaintiff's claims.

B. In the Alternative, the Individual Defendants are Entitled to Qualified Immunity.

I. Basic Elements

In the event the Court does not agree these Defendants are absolutely immune from Plaintiffs claims, the individual Defendants are entitled to qualified immunity for claims arising under § 1983. It is well-established that the Fifth Circuit applies a "heightened pleading" standard in cases alleging civil rights liability under § 1983. *See, Leatherman v. Tarrant County Narcotics Unit,* 113 S.Ct. 1160, 1161 (1993). Although *Leatherman* discarded the standard in § 1983 cases alleging municipal liability, the Court expressly declined to address the issue of the applicability of the "heightened pleadings" standard in cases such as this one involving individual government officials. *Id.* at 1162. Under the "heightened pleadings" doctrine, a plaintiff's complaint must ". . . state with factual detail and particularity the bases . . ." for her § 1983 claims. *Elliott v. Perez,* 751 F.2d 1472, 1473 (5th Cir. 1985). This pleading requirement extends to an explanation of why the qualified immunity defense available to state officials sued in their individual capacity for § 1983 violations would not ultimately shield the individual Defendants in this case from liability. *Burns-Toole v, Byrne,* 11 F.3d 1270, 1273 (5th Cir. 1994); *Elliott,* 751 F.2d at 1473. Section 1983 plaintiffs simply cannot rely on conclusory allegations alone. *Id.* at 1479. They must

specifically plead detailed facts supporting the contention that the plea of immunity could not be sustained. *Vinson v. Heckmann,* 940 F.2d 114, 115-116 (5th Cir. 1991), *citing Elliott,* 751 F.2d at 1482.

Qualified immunity is a doctrine which renders a public official exempt from suit when a plaintiff fails to assert her claim with sufficient factual detail and particularity against that government official. *Elliott v. Perez,* 751 F.2d 1472, 1478-79 (5th Cir. 1985). The purpose of this doctrine is to allow public officials to carry out their normal functions without the fear of lawsuit. *Anderson v. Creighton,* 483 U.S. 635, 638 (1987). Because bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery, a solid factual foundation must support any broad conclusory allegations. *Harlow v. Fitzgerald,* 457 U.S. 800, 817-818 (1982).

Qualified immunity involves a two-step analysis. First, a determination must be made whether the plaintiff has articulated a clearly established Constitutional right. That is, has the Plaintiff stated a claim of any constitutional violation. Secondly, if a clearly established right is implicated by the Defendant's actions, the official is still entitled to qualified immunity if an objectively reasonable person could not have known such conduct would violate plaintiff's Constitutional rights. *See, Siegert v. Gilley,* 500 U.S. 226, 231-32, 111 S.Ct. 1789 (1991). It is not enough to show that the right in question is established at a high "level of generality," as, for example, "the right to due process of law." *Anderson v. Creighton,* 483 U.S. 635, 639 (1987). Instead, "the right the official is alleged to have violated must have been 'clearly

established' in a more particularized, and hence more relevant, sense." *Id.* at 640. "In determining whether the law is clearly established, it is important to consider the facts of the cases relied upon as precedent." *Spivey v. Elliott*, 29 F.3d 1522, 1527 (11th Cir. 1994). Consequently, to overcome qualified immunity, "the plaintiffs must show that the illegality of the challenged conduct was clearly established in factual circumstances closely analogous to those of this case." *Richardson v. Oldham,* 12 F.3d 1373, 1381 (5th Cir. 1994); *See also*, *Contu v. Rocha,* 77 F.3d 795, 807 (5th Cir. 1996) (the "relevant legal role which must be 'clearly established' is identified with reference to the particularized facts and circumstances of the case").

Plaintiff, who has knowledge that his claims are bound to bring forth the assertion of qualified immunity as a defense to individual liability, has not met the "heightened pleadings" burden, and has not stated his case with sufficient particularity to overcome Defendants' qualified immunity. Each of Plaintiff's remaining claims allege Constitutional violations pursuant to § 1983, and thus they are each subject to Defendants' assertion of qualified immunity. (Exhibit C, Plaintiff's Second Amended Complaint).

2. Plaintiff Fails to Meet the Two Part Test

As shown below, Plaintiff has not plead claims alleging a Constitutional violation, and thus does not satisfy the first prong of the qualified immunity two part test.[3]

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[3] See individual arguments for each cause of action in sections "C"-"F".

Assuming, arguendo, that Plaintiff has satisfied the first step in the two part analysis, he cannot show that Defendants acted in an objectively unreasonable manner. In fact, when asked to articulate the motives behind the investigation that led to the revocation of his license, Plaintiff replied: "I don't know what their motives were . . . and I don't know on what they were acting . . ." (Exhibit D, p. 294). Plaintiff cannot maintain a claim that Defendants acted in an objectively unreasonable manner in light of the fact that he was and still is unaware of the evidence that the Board had gathered. Plaintiff can only resort to speculation and is unable to designate any specific facts that would satisfy his burden and meet the applicable test.

In light of the evidence presented to them, each Defendant acted reasonably and without regard to any retaliatory motives. Defendants Drs. Babin, Minatra, and Kemp were not even aware Plaintiff's office had ben searched until after the institution of this lawsuit. These Board members signed the Board order after hearing all the available evidence. (Exhibits E, F, and G) With regard to Dr. Babin, Plaintiff admits that the only thing he knows about which gives him cause to believe that Babin did something wrong to him personally is that "he was engaged in a conversation about [Plaintiff] in 1987 prior to the revocation hearing, the contents of which [Plaintiff] is unaware." (Exhibit H, p. 194). Plaintiff also admits that has no evidence of Dr. Minatra's actions with regard to him other than to listen to the evidence at the revocation hearing and sign the Board order." *Id.* at 219. His only evidence pertaining to Kemp revolves around the fact that he thinks Kemp was present when Plaintiff's name was brought up prior to the Board meeting. *Id.* at 180. Other than that, Kemp did nothing other then sign

the Board order. *Id.* There is no evidence which brings into question whether these Defendants acted in an objectively unreasonable manner. There is no evidence Defendants Dr. Ku, Shamblin, and Byrne who became Board members after the search of Plaintiff's office, conspired to retaliate against Plaintiff for his involvement in advertising. Again, their only involvement amounted to signing the order after hearing all the available evidence. (Exhibit I and Exhibit J). Indeed, Plaintiff admits that Dr. Ku did nothing "other than to listen to the evidence at the revocation hearing and sign the Board order." (Exhibit H, p. 219). Furthermore, Plaintiff admits that he knows nothing else about Dr. Shamblin "besides that a Shamblin was the secretary of the Board at the time that the Board order was entered and that Shamblin's name appears on this piece of paper. . ." *Id.* at 216. His only claim against Dr. Byrne is an allegation in which he states that "he was the person, I'm led to believe, who had the input about – in the agreed Board order, that I go into the peer assistance program for having a substance abuse problem." *Id.* at 195. Not only is this utter speculation and therefore not prohibitive, it is also irrelevant to the instant lawsuit.

Dr. Dickson also a Board member, who heard the evidence in support of the complaint against Dr. Beck noted that Plaintiff did not present a defense or even show up at the hearing, and signed the order. (Exhibit K). Again, Plaintiff admits that Dickinson did nothing "other than to listen to the evidence at the revocation hearing and sign the Board order." (Exhibit H, p. 219). Defendant Bolton was simply a passive observer to the whole process and never engaged in any activity that would deprive Plaintiff of a Constitutional right. (Exhibit L) Plaintiff admits that Bolton's only role in the lawsuit is due to the fact that Plaintiff heard, prior to the

revocation hearing, that Bolton was involved in a conversation in which Plaintiff's name came up. (Exhibit H, p. 190). Nowhere does Plaintiff make an allegation that would bring into question whether these Defendants acted in an objectively unreasonable manner.

Plaintiff's allegation in regard to Defendant Santos is speculative, and not based upon on any direct evidence. Santos, as Secretary/Treasurer of the Board, did play a role in reviewing complaints to determine if the Board should hear them. (Exhibit M, p. 12). At that stage, he would return the case to the chief investigator who would present the violations to the Board Attorney in order to draw up the formal complaint. *Id.* After receiving the complaint and investigatory report regarding Plaintiff, Santos did not have the discretion to do anything other than docket the matter for a hearing before the Board. *Id.* at 39. At no time during his tenure did Santos provide information to the investigators regarding whom they should target. *Id.* at 15. In fact, until they reported the violations to him, Santos did not know that the investigators were searching Plaintiff's office. *Id.* at 23. Moreover, Santos, himself, advertised his dentistry practice, and did not feel that Plaintiff's advertisements were illegal or immoral. *Id.* at 32. Santos acted completely reasonably in light of the evidence presented him, and Plaintiff cannot detail the motive behind a claim alleging Plaintiff's Constitutional rights were violated. (Exhibit D, p. 294) Plaintiff's allegations against Santos are purely conjecture based, and therefore not evidence of the claims. Plaintiff's claims do not amount to violations of Constitutional rights or objectively unreasonable behavior. *Id.* at 296, 299, 302, 304, 306-307, 310, 313-317, 322, 324, 338, 339, 342, 351, 353, 357, 358, 361, 362, 366, 374, 377, 378.

Defendant Nail was the executive director of the Board at the time of the events surrounding Plaintiff's claims. Nail acknowledged the procedures used in investigating complaints, and nothing Plaintiff's does not dispute that Board procedure was followed. (Exhibit N, p. 13-17). The investigation of Plaintiff's office and prescription drug records was in accordance with Board rules, and in Nail's judgment the evidence collected supported the filing of an official complaint against Plaintiff. *Id.* at 73,79-80, 86-87. Finally, Nail states that there were no retaliatory motives underlying any of the Board's actions, since the only Board member who knew Plaintiff was Santos, and most of the other members, when notified of this lawsuit, did not even remember Plaintiff's name. *Id.* at 91-92. There is no evidence supporting the notion that Defendant Nail acted in an objectively unreasonable manner.

Defendant Pitcock was the chief investigator for the Board. However, he was not directly involved in the investigation of Plaintiff, but rather was the supervisor, who oversaw the whole operation. (Exhibit O, pp. 44, 81). After investigating the complaint, the investigators would turn the file over to the Secretary (Santos in this case), who, if necessary, would recommend follow up work. *Id.* at 27. After reviewing all of the evidence, Pitcock concluded that there was sufficient proof of Plaintiff's guilt. *Id.* at 48, 49, 52, 53, 57, 70, 86, 90, 93, 99, 109, 112. He found that there was proof supporting allegations of multiple technical violations of the Controlled Substances Act. *Id.* at 49. At all

times, he followed guidelines, and at no time did he act in an objectively unreasonable manner.[4]

Finally, Defendants Bolton, Minatra, Kemp, Santos, Byrne, Dickinson, Ku, and Shamblin all signed the Board order. (Exhibit P). In so doing, they acknowledged that they carefully considered. The evidence presented them, and made their rulings solely based upon that evidence. *Id.* Their conclusions were fully supported by the evidence and they clearly acted in an objectively reasonable manner.

Plaintiff has failed to meet his burden under the "heightened pleadings" test. *Vinson,* 940 F.2d at 115-116. He has also failed to meet either prong of the two part test used to determine whether individual defendants are entitled to qualified immunity. *Siegert*, 500 U.S. at 231-32. As shown below, he cannot prove that there were any violations of his Constitutional rights, and as shown above, he fails to prove that any of the individual Defendants acted in an objectively unreasonable manner.

C. Plaintiff Fails to Prove Conspiracy Existed Under 42 U.S.C. §1983.

A prima facie case of conspiracy requires two elements. The plaintiff must must demonstrate (1) the existence of a conspiracy involving state action, and (2) an actual deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy. *Pfannstiel v. City of Marion,* 918 F.2d 1178, 1187 (5th Cir. 1990). Establishing

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[4] See Section E for appropriate guidelines.

the existence of a conspiracy requires proof of two distinct elements – an agreement among the alleged co-conspirators, and an overt act causing damage to Plaintiff. In addition,

> [A civil conspiracy] is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage.

Scherer v. *Balkema,* 840 F.2d 437, 441-42 (7th Cir.), *cert. denied* 486 U.S. 1043 (1988) *(quoting Hampton v. Hanrahan,* 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds,* 446 U.S. 754 (1980), *reh'g denied,* 448 U.S. 913 (1980)). However, a conspiracy by itself is not actionable under 42 U.S.C. § 1983; Plaintiff must establish an actual violation of 42 U.S.C. § 1983 to sustain his claim of a conspiracy under 42 U.S.C. § 1983. *Hale v. Townley,* 45 F.3d 914, 920 (5th Cir. 1995); *Pfannstiel,* 918 F.2d at 1187; *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir. 1982).

In *Hilliard v. Ferguson,* 30 F.3d 649 (5th Cir. 1994), the Fifth Circuit addressed the intra corporate conspiracy doctrine in the context of a 42 U.S.C. § 1985(3) claim. In *Hilliard,* the plaintiff alleged a conspiracy between the superintendent of a school board, who was an employee of the board, and the school board itself. *Hilliard,* 30 F.3d at 649,

650. The court, citing several Fifth[5] and Sixth Circuit[6] cases, concluded that the superintendent and the board were all members of the same collective entity. *Id.* at 653. Following this line of authority, the court applied the Fifth Circuit's long-standing rule that a "corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Nelson Radio & Supply Co. v. Motorola. Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953). The *Hllliard* court specifically held that "a school board and its employees constitute a single legal entity which is incapable of conspiring with itself for the purposes of § 1985(3)." *Hilliard,* 30 F.3d at 653. Plaintiff could not establish that anyone other than the members of the same collective entity – the Texas State Board of Dental Examiners – conspired against him, and thus the intra corporate conspiracy doctrine barred him 42 U.S.C. §1983 conspiracy claim against Mr. Strain. *Hilliard,* 30 F.3d at 653-54.

As previously enunciated in *Scherer,* a key element of any conspiracy is the existence of "two or more persons acting in concert." *Scherer,* 840 F.2d at 441-42. In this case, each of the individual Defendants was acting either as a

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[5] *See Moody v. Jefferson Parish School Board*, 803 F, Supp 1155, 1166 (D.La. 1992), *aff'd,* 2 F.3d 604 (5th Cir. 1993); *Hankins v. Dallas Indep. School Dist.*, 698 F. Supp. 1323, 1330 (D.Tex. 1988); *Chambliss v. Foote,* 421 F. Supp. 12, 15 (D.La. 1976), *aff'd,* 562 F.2d 1015 (5th Cir. 1977), *cert. denied,* 439 U.S. 839 (1978).

[6] *See Hull v. Cuyahoga Valley Joint Vocational School Dist.*, 926 F.2d 505 (6th Cir.), *cert. denied*, 501 U.S. 1261 (1991).

TSBDE board member or TSBDE employee at all times relevant to Plaintiff's conspiracy claims. Therefore, Plaintiff cannot demonstrate this required element. Since Plaintiff fails to establish that two or more *distinct* persons were acting in concert, the intra corporate conspiracy doctrine bars Plaintiff's conspiracy claims under 42 U.S.C. § 1983. *Cf, Hilliard,* 30 F.3d 649.

Plaintiff may argue that because the individual Defendants acted for their own personal purposes, Plaintiff has properly alleged a conspiracy under 42 U.S.C. § 1983 against separate, individual actors. *See Brever v. Rockwell Intern. Corp.,* 40 F.3d 1119 (10th Cir. 1994). Neither Plaintiff's Second Amended Complaint or his summary judgment proof, however, can support such an argument. In *Brever,* the Tenth Circuit recognized an exception to the intra corporate conspiracy doctrine when an officer or agent has an independent personal stake in achieving the ends of the conspiracy, such as fear of loss of employment or possible criminal indictment. *Brever,* 40 F.3d at 1127. In this case, Plaintiff has not made any allegations of independent personal motives on the part of the individual Defendants in his Second Amended Complaint.

D. Plaintiff Has Failed to Prove That There Existed a Conspiracy to Deprive Him of His First Amendment Rights Under 42 U.S.C. §1983.

Plaintiff has alleged that Defendants conspired to deprive him of his dental license in retaliation for his exercise of his First Amendment rights. An individual cannot be discharged, disciplined, or punished for her constitutionally protected interest in freedom of speech. *Rankin v.*

McPherson, 483 U.S. 378, 383 (1987); *Thompson v. City of Starkville, Miss.,* 901 F.2d 456, 460 (5th Cir. 1990); *Page v. DeLaune,* 837 F.2d 233, 237 (5th Cir. 1988). Plaintiff's First Amendment rights do have limits, however. To establish a claim under 42 U.S.C. §1983 based on this right, Plaintiff must satisfy a three-part test: (1) the speech in question must address a matter of public concern; (2) the plaintiff's interest in commtmicating upon a matter of public concern must be greater than the defendant's interest in promoting the efficiency of the public service the defendant performs; and (3) the plaintiff must show her speech motivated the defendant's decision to discharge, discipline, or punish her. *Thompson,* 901 F.2d at 460; *Frazier v. King,* 873 F.2d 820, 825 (5th Cir.), *cert. denied sub nom. in Davoli v. Frazier,* 493 U.S. 977 (1989).

This third causation element requites that the Court examine two issues – whether the Plaintiff has established that his advertising was a motivating factor in his allegedly discriminatory deprivation of his denial license, and whether Defendants have shown that they would have reached the same decision as to the revocation and suspension of Plaintiffs dental license even in the absence of the protected conduct. *Mt. Healthy City School Dist. v. Doyle,* 429 U.S. 274, 287 (1977); *Frazier,* 873 F.2d at 826. As mentioned above, when asked to specifically identify the motives behind Defendants' actions, Plaintiff admits that he does not know. (Exhibit D, p. 294) He offers no proof that Defendants' actions in effectuating the search and subsequent revocation of his license were motivated by his exercise of speech in commercial advertising. The overwhelming evidence points to the legitimate reasons that motivated the actions of the Board members. "Summary judgment, to be sure, may be

appropriate, even in cases where elusive concepts such as motive or intent are at issue . . . if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Forsyth,* 19 F.3d at 1533 (quoting *Krim v. BancTexas Group, Inc.,* 989 F.2d 1435, 1449 (5th Cir. 1993)).

E. Plaintiff Has Failed to Prove There Existed a Conspiracy to Deprive Him of His Fourteenth Amendment Rights Under 42 U.S.C. § 1983

Plaintiff alleges that Defendants conspired to deprive him of his dental license without due process of law in violation of the Fifteen and Fourteenth Amendment. The essential principle of "due process" is that a deprivation of life, liberty, or property be preceded by notice and an opportunity for a hearing. *Cleveland Bd of Educ, v. Loudermill,* 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985).

The prerequisites for sufficient notice regarding revocation hearings before the TSBDE set forth four elements which must be contained with the notice letter:

> 1) a statement of time, place, and nature of the hearing;
> 2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
> 3) a reference to the particular sections of the states and rules involved; a short and plain statement of the matters asserted.

See, 22 T.A.C. § 107.30(b). The Administrative Code also states that notice must be received prior to ten days before a hearing in which license revocation may be involved. See 22 T.A.C. § 107.30(a). (Exhibit V and Exhibit W) Plaintiff contends that notice was inadequate because the four requirements were spread out over two letters, one dated August 4, 1997 and the other September 10, 1997. (Exhibit Q, pp. 341-343). Both these letters were sent well over the ten day minimum requirement, and, although each might not have contained the four elements outlined above, they served to place Plaintiff on notice that a hearing would take place regarding the status of his dental license s pursuant to a compliant. Furthermore, all that is required is "reasonable notice". There is certainly no constitutional requirement that notice must encompassed in one document. It is clear from the two letters that Plaintiff was given proper, reasonable notice, and there is not genuine issue of fact to overcome summary judgment.

Finally, the doctrine of *res judicata* bars Plaintiff from litigating the due process issue in this case. In order to preclude a previously litigated claim from being brought in a subsequent action, the following conditions must be satisfied: (1) the parties in the later action must be identical to or in privity with the parties in the prior action; (2) a court of competent jurisdiction must have rendered the judgment in the prior action; (3) the prior action must have concluded with a final judgment on the merits; and (4) the same claim or cause of action must be involved in both suits. *U.S. v. Shanbaum,* 10 F.3d 305, 310 (5th Cir. 1994). These criteria are all met in this case: TSBDE was a party to both lawsuits; an Agreed Judgment was entered by a state district court in Plaintiff's 1988 action; and the primary issue in the 1988 case was the

revocation of Plaintiff's dentistry license without due process of law. (Exhibits R B, and S)

F. Plaintiff Has Failed to Prove There Was a Violation of His Fourth Amendment Rights Under 42 U.S.C, §1983

Plaintiff alleges that the office search violated his Fourth Amendment Rights, protecting him from unreasonable search and seizures. The Fourth Amendment protects people in their homes from unreasonable searches and seizures. *United States v. Richard,* 994 F.2d 244, 247 (5th Cir. 1993). It also applies to commercial premises, such as a dental office. *New York v. Burger,* 482 U.S. 691, 699, 107 S.Ct. 2636, 2642 (1957); *See v. City of Seattle,* 387 U.S. 541, 543, 87 S.Ct. 1737, 1739 (1967).

"The Fourth Amendment does not provide blanket protection against searches . . . on private property. Rather the Fourth Amendment protects [only] those areas in which . . . citizens have a reasonable expectation of privacy." *United States v. McKeever,* 5 F.3d 863, 866 (5th Cir. 1993) (citing *Katz v. United States,* 389 U.S. 347 (1967)). Courts have long recognized that a "reasonable expectation of privacy" is critical in determining what falls within the Fourth Amendment, concluding that a "search" for Fourth Amendment purposes exists only if "[governmental] activity intrudes upon a reasonable expectation of privacy in a significant way." *U.S. v. York* 895 F.2d 1028 (5th Cir. 1990). Moreover, "[a] subjective expectation of privacy does not by itself give rise to Fourth Amendment protection" rather, "the expectation of privacy must be one that society is

prepared to recognize as reasonable." *U.S. v. Smith,* 978 F.2d 171, 177 (5th Cir. 1992).

Finally, warrantless administrative searches must satisfy three requirements: (1) there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *United States v. Villarreal,* 963 F.2d 770, 775 (5th Cir. 1992); *Burger,* 482 U.S. at 702-03, 107.

1. Plaintiff Did Not Have a Reasonable Expectation of Privacy

The expectation that a search will be reasonable extends to administrative inspections designed to enforce regulatory schemes, as well as traditional police searches conducted for the gathering of criminal evidence. *Burger,* 482 U.S. at 700, 107 S.Ct. at 2642; *See,* 387 U.S. at 543, 87 S.Ct. at 1739. The Texas Administrative Code directly addresses the expectation of privacy held by dentists regarding their dental records:

> "Dental records shall be made available for inspection and reproduction *on demand* by the officers, agents, or employees of the Texas State Board of Dental Examiners." *(emphasis added)*

See, 22 T.A.C. § 109.144. Defendant Pitcock entered the premises pursuant to such authority, and the authority granted the State Board of Dental Examiners under the Dental Practices Act.[7] (Exhibit O, p- 47). The office was searched pursuant to a Notice of Inspection of Controlled Premises issued under the Texas Controlled Substances Act. TEX. HEALTH & SAFETY CODE ANN. § 481.001, *et seq.* (Vernon 1992).[8] Upon entering Plaintiff's office, Pitcock presented a Notice of Inspection to Plaintiff, and explained the purposes of the search. *Id* at 56-57. As Plaintiff's signature on this Notice of Inspection of Controlled Premises demonstrates, he was aware of the intent to search before the actual search began. (Exhibit A). Although the search lasted a short while, Pitcock and the investigators were able to uncover several possible violations of the Controlled Substance Act. (Exhibit O, p. 49)

Plaintiff maintained his subjective belief that he had a right to privacy in regards to the search of such dental records. (Exhibit T, pp. 500-507). Such subjective belief,

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[7] See art. 4544a stating that: The State Board of Dental Examiners is charged with the duty of aiding in the enforcement of the Statutes of this State regulating the practice of dentistry and any member of said Board may present to a prosecuting officer complaints relating to violations of such Statutes; and said Board, through its members, officers, counsel and agents may assist in the trial of any cases involving alleged violations of said Statutes subject to the control of the prosecuting officers."

[8] See T.A.C. 109.144(c): "All records pertaining to controlled substances and dangerous drugs shall be maintained in accordance with the Texas Controlled Substance Act."

in light of the Statutes regulating the dental practice, are insufficient to create a reasonable expectation of privacy under the Fourth Amendment. *Smith,* 978 F.2d at 177. The Texas Controlled Substances Act provides the impetus for the legality and reasonableness of Defendants' actions:

> The Director May enter controlled premises at any reasonable time and inspect the premises and items describe by Subsection (b) in order to inspect, copy, and verify the correctness of a record, report, or other document required to be made or kept under this chapter and to perform other functions under this chapter. The director shall state the purpose of the entry and present top the owner, operator, or agent in charge of the premises appropriate credential and a written notice of inspection authority.

See, Tx. Health & Safety Code § 481.181. Certainly, Plaintiff did not have a reasonable expectation of privacy in regard to these records, and Defendants complied with all pertinent regulations. There is simply no evidence of constitutional import to the contrary.

2. The Three Part Test for Warrantless Searches is Met

The search about which Plaintiff complains also satisfied the criteria for a warrantless search. *Villarreal,* 963 F.2d at 775. First, the State of Texas obviously has a "substantial" interest in overseeing the use of controlled substances in industries such as dentistry. The evidence

turned up at the search certainly supports the notion that Plaintiff's office was appropriate for such a search. (Exhibit U and Exhibit O, p. 49) Second, unannounced inspections such as those made of Plaintiff's office in 1986 further the regulatory scheme set out in the Texas Controlled Substances Act by ensuring the statute's enforcement. *United States v. Biswell,* 406 U.S. 311, 316, 92 S.Ct. 1593, 1596 (1972) (unannounced, frequent inspections essential if inspection to serve as effective, credible deterrent). Third, the Texas Controlled Substances Act provides a constitutionally acceptable substitute for a warrant in the form of the procedure for searches of premises and records spelled out in §481.181 of the Act. The Notice of Inspection given to Plaintiff prior to the search was adequate and placed him on notice of the purposes of the search. (Exhibit A). Therefore, Defendants are entitled to summary judgment on Plaintiff's Fourth Amendment claim.

V.
CONCLUSION

Because Defendant's are quasi-judicial officials and plaintiff's claims falls squarely within there role as members of a Board with adjudicatory powers vis a vis Plaintiff they are entitled to absolute immunity. In the alternative, because their actions were done in the good faith exercise of their duties as agents and or members of the Board they are at least entitled to qualified immunity from Plaintiffs claims. Plaintiff's due process claims fail because they are res judicata. Finally, there is no credible evidence of a conspiracy to deprive Plaintiff of any federally secured sights nor is there any evidence that the plaintiff's Fourth or Fifth Amendments rights were violated by these Defendants.

VI.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request that the Court grant this summary judgment motion in its entirety and dismiss all of Plaintiff's claims against them. Movants also pray for any and all further relief, at law or in equity, to which they have shown themselves to be justly entitled.

Respectfully submitted,

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APPENDIX

Exhibit A	Notice of Inspection of Controlled Premises executed July 7, 1986
Exhibit B	Agreed Judgment entered April 1, 1992; In Robert L. Beck D.D.S. v. Texas State Board of Dental Examiners; Cause No. 88-CI-06246; In the 285th District Court of Bexar County, Texas
Exhibit C	Plaintiff's Second Amended Complaint in Robert L. Beck v. Dr. Brian Babin, et al.; Cause No. SA-94-CA-0279 HG; In the United States District Court for the Western District of Texas San Antonio Division
Exhibit D	Deposition of Robert Lee Beck, M.D., D.M.D., February 20, 1997, Volume 2
Exhibit E	Affidavit of Dr. Brian Babin
Exhibit F	Affidavit of Dr. Randolph Minatra
Exhibit G	Affidavit of Dr. William Kemp
Exhibit H	Deposition of Robert Lee Beck, M.D., D.M.D., February 18, 1997, Volume 1
Exhibit I	Affidavit of Dr. Charles T. Ku
Exhibit J	Affidavit of Dr. Ronald Shamblin

Exhibit K	Affidavit of Dr. Terry R. Dickinson
Exhibit L	Affidavit of Dr. L. Jack Bolton
Exhibit M	Deposition of Santos Serna, Jr., February 26, 1997
Exhibit N	Deposition of William S. Nail, February 26, 1997
Exhibit O	Deposition of Michael Pitcock, February 25, 1997
Exhibit P	Board Order executed December 11, 1987
Exhibit Q	Deposition of Robert Lee Beck, M.D., D.M.D., February 20, 1997, Volume 2
Exhibit R	Plaintiff's Complaint in Beck v. TSBDE, et al; Civil Action No. SA-94-CA-0279; In the United States District Court for the Western District of Texas San Antonio Division
Exhibit S	Plaintiff's Original Petition in Robert L. Beck v. Texas State Board of Dental Examiners; Cause No. 88-CI-06246; In the 285th District Court of Bexar County, Texas
Exhibit T	Deposition of Robert Lee Beck, M.D., D.M.D., March 20, 1997, Volume 3

Exhibit U	Texas State Board of Dental Examiners Investigation Report Re: Robert L. Beck, D.D.S., Log Number 86-087
Exhibit V	Letter to Robert L. Beck, D.D.S. from Frank Santos, Jr., D.D.S., dated September 10, 1987, Re: Complaint and Docketed Complaint No. 1987-39
Exhibit W	Letter to Robert L. Beck, D.D.S. from Frank Santos, Jr., D.D.S., dated August 4, 1987, Re: Complaint and Docketed Complaint No. 1987-39

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed May 27, 1998]

No. SA-94-CA-279 HG

ROBERT LEE BECK, M.D., D.M.D., *Plaintiff*,	)
v.	)
DR. BRIAN BABIN, DR. L. JACK BOLTON, DR. ROGER BYRNE, DR. TERRY R. DICKINSON, DR. WILLIAM J. KEMP, DR. CHARLES T. KU, DR. RONALD SHAMBLIN, DR. RANDOLPH D. MINATRA, WILLIAM S. NAIL, MICHAEL PITCOCK, DR. FRANK SANTOS *Defendants*.	)

PLAINTIFF' SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, DR. ROBERT LEE BECK, Plaintiff in the above-styled and numbered action who brings the following Amended Complaint and alleges as follows:

I.

Jurisdiction and Venue

A. Jurisdiction of the federal court exists pursuant U.S.C. § 1331 since there is a civil action arising under the laws and constitution of the United States. This action involves a violation of federal law pursuant to 42 U.S.C § 1983 and 18 U.S.C. § 1961 et seq.

B. Venue is proper in the Western District of Texas, San Antonio Division, since elements of the cause of action alleged in this Complaint occurred in Bexar County in said District and additionally, the Defendant's have all answered herein.

II.

Parties

A. Plaintiff, ROBERT LEE BECK, M.D., D.M.D., is a licensed dentist whose principal place of business is 4118 McCullough, Ste. 17, San Antonio, Bexar County, Texas. Plaintiff practices general dentistry.

B. Defendant, TEXAS STATE BOARD OF DENTAL EXAMINERS, (thereafter referred to as TSBDE) is an agency of the State of Texas responsible for the licensing and regulation of dentistry in the State of Texas. Defendant

is located in the City of Austin, Travis County, Texas, and has filed an answer herein.

C. Defendants, MICHAEL PITCOCK, and WILLIAM S. NAIL, are the former and current executive directors of the TSBDE, who are/were responsible for enforcing the policies, rules and regulations of the TSBDE, and have filed an answer herein.

D. Defendants, DR. WILLIAM J. KEMP, DR. BRIAN BABIN, DR. JACK L. BOLTON, DR. RANDOLPH D. MINATRA, DR. FRANK SANTOS, DR. TERRY R. DICKINSON, DR. ROGER BYRNE, DR. CHARLES KU, DR. RONALD H. SHAMBLIN, are past or current members of the Board of TSBDE, and have all filed answers herein.

III. Statement of Facts

A. Dr. Beck has been a licensed dentist since 1965. He has been practicing dentistry in the state of Texas since 1967. Dr. Beck advertises his dental practice and was one of the first dentists in Texas to do so.

B. In 1980 Dr. Beck joined with other dentists in *Akin v. Texas State Board of Dental Examiners*, Cause No. 301132, filed in District Court in Travis County, Texas. The purpose of this lawsuit was to require the Dental Board to permit Texas dentists to advertise their services.

C. After joining in that lawsuit, and as a result of Plaintiff's exercise of his right to advertise under the 1st Amendment to the United States Constitution, Plaintiff became the subject of a conspiracy among the named

Defendants, who at the time were serving on or working for the Texas State Board of Dental Examiners.

D. According to Board Investigator Wayne Youngblood, Defendant Michael Pitcock, who supervised the Board investigators, repeatedly stated that, "the Board wants to get Beck." It is clear from the comments of the Defendants' that the Defendants did not approve of dental advertising. As a result of dental advertising and the exercise of their 1st Amendment rights, the dentists on the board, including the named Defendants, demonstrated repeated animosity toward at least three advertising dentists; Dr. Akin of Austin, Dr. Sulleman and Dr. Beck of San Antonio.

E. According to Board Investigator Wayne Youngblood, official complaints and investigations against the above named advertising dentists and others were generated directly by the Defendants for the purpose of intimidation and in retaliation for the exercise of the 1st Amendment rights of the named dentists and the Plaintiff in particular.

F. On July 7, 1986, the Texas State Board of Dental Examiners, at he direction of the Defendants, Michael Pitcock in particular, conducted an unauthorized and warrantless search of Dr. Beck's dental office in San Antonio for the specific purpose of obtaining evidence of criminal activity. This search was conducted by Trooper Frank Perez of the Department of Public Safety, Michael Pitcock and Wayne Youngblood of the Texas State Dental Board.

G. The Defendant Pitcock acknowledges that it was not necessary to have DPS Trooper Perez present, but that Perez was there for the purpose of investigating criminal

activity which the State Dental Board was not authorized to prosecute or investigate. Trooper Perez was in full uniform and acting as a peace officer for and on behalf of the State of Texas and acting under color of law. This acknowledgement by then Board Executive Director Pitcock, evidences a criminal investigation was contemplated and that a search was executed on the pretext of an administrative search and review of Dr. Beck's patient records.

H. Ostensibly to ensure compliance with the record keeping rules and procedures dictated by the State Dental Board, Trooper Perez, Defendant Pitcock and Youngblood participated jointly in a search and review of Dr. Beck's patient records for 1 ½ hours. Although Pitcock and Youngblood indicated that the purpose of their visit was to determine if prescription drugs were being properly dispensed, Perez, Pitcock and Youngblood failed to properly review the entirety of a[illegible]atient records to determine whether were not all of the prescriptions were in fact accounted for.

I. Upon completion of the search, Dr. Beck was told by the Defendant Pitcock that he could provide additional information to the Texas State Board of Dental Examiners that would account for the drugs which the Defendants were investigating and which count allegedly indicated gross non-compliance with the Board rules. Dr. Beck did provide additional information which substantiated compliance with the Board rules but said information was wholly ignored by Defendant Pitcock, and ultimately, also ignored by the Defendants when they made specific findings of fact against the Plaintiff.

J. At a Board hearing during which the Plaintiff was not in attendance, the Defendants were presented evidence which was not alleged properly in a Board "complaint", and made findings of fact and conclusions of law which were not supported by any evidence whatsoever. At the same Board hearing, the Defendants collectively signed an order revoking the Plaintiff's license to practice dentistry in the State of Texas.

K. The Defendants' conduct in initiating the criminal search of Plaintiff's office, in scheduling a disciplinary hearing against the Plaintiff, in making specific findings of fact unsupported by any evidence and in revoking the license of the Plaintiff was the result of selective prosecution because of the Plaintiff's advertising.

L. Dr. Beck had no knowledge of the conduct alleged herein until November, 1992, when former Board Investigator Wayne Youngblood testified under oath before the legislative "Sunset Committee". On February 5, 1994, Wayne Youngblood gave a signed statement in which he stated, among other things,

> "The Board targeted certain dentists for selective prosecution because of their practice of advertising. Dr. Robert L. Beck was among the dentists targeted for license suspension or revocation because of advertising."

M. Dr. Beck commenced this action within two years of learning that all of the Board's actions undertaken

against him since 1986 were the result of retaliation for the lawful exercise of his First Amendment rights.

IV. Causes of Action

A. The conduct of the Defendants as described above, each acting individually and collectively, constitutes a specific intent and a conspiracy to deprive Dr. Beck of his Constitutional rights to freedom of speech and additionally to deprive him of a valuable property interest in his license to practice dental medicine in the state of Texas. The conduct as alleged above is a violation of the rights guaranteed the Plaintiff by the 1st, 4th, 5th, and 14th Amendments to the United States Constitution. The conduct of each of the Defendants, as alleged above, was engaged in under *color of law*, (as that term has been defined in law) by each Defendant who acted outside the bounds of his authority by knowingly acting in violation of the state law, *i.e.*, the rules of the State Board of Dental Examiners, and by arbitrarily and abusively using their power as directors of the State Board for the purpose of depriving the Plaintiff of his Constitutionally protected rights including his property rights. These constitutional violations are actionable under 42 U.S.C. §1983 against the Defendants in their individual capacities.

B. The conduct of the Defendants as described above constitutes a violation of Plaintiff's Constitutional right to be free of unreasonable searches and seizures under the Fourth Amendment of the United States Constitution. The search of the Plaintiff's office premises on July 7, 1987 was a furtherance of the retaliatory action against the Plaintiff for his engaging in lawful advertising. The search was made without a warrant; was done for the purpose of investigating

criminal activity (ostensibly evidenced by the suspected lack of records supporting the dispensation of narcotics); and had nothing to do with a regulatory inspection of the records kept by the Plaintiff with respect to the proper distribution of prescription drugs. In addition, the search was motivated by the desire to gather any evidence available which would allow the Defendants to "get Beck" and to allow the Defendants to punish him for the exercise of his 1st Amendment rights, i.e., advertising his dental trade. The violation of Dr. Beck's constitutional rights is actionable under 42 U.S.C.§ 1983.

C. The conduct of the Defendants, as alleged above, constitutes an unlawful taking of property without substantive or procedural Due Process of law in violation of the 5th and 14th Amendments to the United States Constitution. Specifically, the Defendants Pitcock and Santos knowingly presented falsified allegations and evidence to the State Board of Dental Examiners, including the named Defendants. Defendant Pitcock refused to review the records produced by the Plaintiff to substantiate the allegations of "unaccounted for" prescription narcotics, specifically, Seconal and Valium. As a result of same, both Pitcock and Santos knowingly presented as fact, material evidence which they both knew to be incorrect.

D. The Plaintiff would show that there is absolutely no evidence in any record, nor was there any evidence presented to the named Defendants at the Board hearing, that the Plaintiff self-prescribed two thousand five hundred (2500) Empirin No.3, nor any of the other narcotics alleged in the complaint filed with the Board. In spite of this, the Defendants knowingly and intentionally signed an Order

with a specific finding of fact the Plaintiff had "prescribed to himself" 2500 tablets.

E. Further, there is no evidence that the Plaintiff held a fellow dentist at "gunpoint" during an alleged confrontation, yet the Defendants made a specific finding of such in the Board Order which they knowingly signed absent such evidence. The Board specifically relied upon both of these findings of fact and the subsequent conclusions of law to revoke the license of the Plaintiff. Plaintiff would assert that the conduct in so revoking the license was done clearly in violation of the law and that no reasonable person could have drawn the conclusions upon which the Plaintiff's license was revoked.

F. The alleged procedural and substantive safeguards failed to protect the Plaintiff in that the hearing was a "Kangaroo court" in which the penalty was a foregone conclusion by the Defendants, especially Pitcock and Santos. The hearing at which the license was suspended was merely a means to an end, i.e., the revocation of the Plaintiff's dental license as a result of the exercise of his right to advertise. The entire process, which began in 1986 and ultimately resulted in the suspension of Dr. Beck's dental license, was tainted by improper retaliatory motives and disregard of proper exculpatory evidence. From the initiation of the investigation to the revocation of the Plaintiff's license, the entire process was factually and legally incapable of passing Constitutional muster and accordingly, resulted in depriving. Dr. Beck of both substantive and Procedural Due Process.

G. As a result of the Defendants' actions more fully described above, Plaintiff was unable to keep his dental license in the state of California, as well as other jurisdictions.

V. Damages

A. The conduct of Defendants as described above has directly and proximately damaged Plaintiff in the following:

1. In the loss of patients, staff, and the goodwill which was associated with the Plaintiff's business prior to the conduct of the Defendants;

2. In monetary damages for the loss of income in the past and in all reasonable likelihood loss of future earnings as . . .

* * *

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed August 1, 1995]

No. SA-94-CA-279

ROBERT LEE BECK, M.D., D.M.D.,
Plaintiff,

v.

THE TEXAS BOARD OF DENTAL EXAMINERS, et al.,
Defendants.

ORDER

On this date came on for consideration by the Court the above-styled and numbered cause. Pending before the Court is the Report and Recommendation of United States Magistrate Judge Robert B. O'Connor to which objections have been filed. After having conducted an independent review of the record in this cause, and having made a de novo review as to those matters specifically objected to; the Court hereby accepts and **adopts** the Report and Recommendation as follows:

It is accordingly **ORDERED** that the defendants' motion for summary judgement be **GRANTED** in part and **DENIED** in part. All of plaintiff's claims against the Board and the individual defendants in their official capacities are dismissed with prejudice. Plaintiff's cause of action pursuant to the Commerce Clause is dismissed with prejudice as to all defendants. The plaintiff's RICO claims are dismissed with prejudice as to all defendants as well. Plaintiff's cause of action pursuant to the Texas constitution is dismissed with prejudice as to all defendants.

It is **FURTHER ORDERED** that plaintiff's motion for leave to file a second amended complaint is **DENIED**.

It is **FURTHER ORDERED** that the defendants' objections to the Magistrate Judge's Report and Recommendation are well taken to the following extent:

All claims against defendants Crockett Camp, Thomas Camp, Carl C. Hardin, Dr. James L. Bolton, Dr. Rene E. Holt, Dr. E. Penn Jackson, Glenna Johns, Dr. Neil A. Morgan, Dr. James W. Orr, Dr. Glenda Smith, Nancy Tibbets, Dr. Thomas R. Uribe, and Dr. Wilfred Whiteside are dismissed with prejudice on the basis of qualified immunity.

The Fourth Amendment claims against defendants Dr. Roger Byrne, Dr. Charles T. Ku, and Dr. Ronald Shamblin are dismissed on the basis of qualified immunity.

Plaintiff's claims against defendant Babin for deprivation of property rights under the Fifth and Fourteenth

Amendments are dismissed with prejudice on the basis of qualified immunity.

So **ORDERED** this 1st day of August, 1995.

/s/_____
H. F. GARCIA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed July 31, 1998]

No. SA-94-CA-279 HG

ROBERT LEE BECK, M.D., D.M.D., *Plaintiff*,	)
v.	)
THE TEXAS BOARD OF DENTAL EXAMINERS, et al., *Defendants*.	)

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, consistent with this Court's Order filed this same date, that:

The Defendants' Second Motion for Summary Judgment be GRANTED, and Plaintiff's claims against the Defendants are hereby DISMISSED WITH PREJUDICE. All pending Motions are DISMISSED AS MOOT.

DATE: July 31, 1998

WILLIAM G. PUTNICKI, Clerk
United States District Court

/s/_____
(By) Deputy Clerk, Carol West

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed April 4, 2000]

No. 98-51111

ROBERT LEE BECK, MD, DMD,
Plaintiff-Appellant,

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS; ET AL,
Defendants,

MICHAEL PITCOCK; WILLIAM S. NAIL; WILLIAM J. KEMP, DR; BRIAN BABIN, DR; JACK L. BOLTON, DR; RANDOLPH D. MINATRA, DR; FRANK SANTOS, DR; TERRY R. DICKINSON, DR; ROGER BYRNE, DR; CHARLES T. KU, DR; RONALD H. SHAMBLIN, DR,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas, San Antonio

ON PETITION FOR REHEARING

Before WIENER and STEWART, Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

REHG- 2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

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* Senior District Judge John M. Shaw of the Western District of Louisiana, was a member of the panel that heard oral argument on this case, but because of his death on December 24, 1999, he did not participate in this decision. This case is being decided by a quorum pursuant to 28 U.S.C. Section 46(d) .

APPENDIX I

AFFIDAVIT OF SANTOS SERNA, JR.

"My name is Santos Serna, Jr., I am over the age of 18, and have never been convicted of a felony. I have personal knowledge of the facts stated herein."

"I would like to state that I was employed by the Texas State Board of Dental Examiners from December 1st, 1987 until May 31st, 1997, starting in the capacity as an Investigator and culminating as the Director of Enforcement. I am familiar with the procedures necessary in the enforcement of the Texas Dental Practices Act and was so at the time the license of Dr. Beck was revoked by the Board Order. I have personal knowledge and training with the required procedures which were in effect at the time that the Docketed Complaint was presented to the Board regarding Dr. Beck. I have read the transcript of the hearing which occurred on the 7th day of November, 1987, during which evidence was presented to the Board against Dr. Beck. I have reviewed the Board Order revoking the license of Dr. Beck.

"There is no evidence which would justify the revocation order which was signed by the Board. There is no evidence supporting the conclusion that Dr. Beck "self-prescribed any narcotics. There is no evidence supporting the conclusion that Dr. Beck threatened Dr. Hatten at "gun point". There is no complaint which was ever filed by either Dr. Hatten or by Dr. Masters against Dr. Beck. Without a complaint addressing the allegations being filed by either of

them, the validity of the complaints which were "docketed" are severely in question."

"In my opinion the revocation action taken against Dr. Beck was based upon undocumented and uncorroborated evidence insufficient enough to support a revocation action. In my ten years of experience, I have never seen a license revoked on such lack of evidence nor the type of evidence which the Board reviewed in Dr. Beck's case."

/s/_____
SANTOS SERNA, JR.

SWORN TO AN SUBSCRIBED BEFORE ME THE UNDERSIGNED NOTARY ON THIS THE 28TH DAY OF JULY, 1998.

/s/_____
Sylvia Villarreal-Aguillen
Notary Public

My Commission Expires:
June 8, 2001

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Dated February 25, 1997]

No. SA-94-CA-279

ROBERT LEE BECK, M.D., D.M.D., *Plaintiff*,	)
v.	)
DR. BRIAN BABIN, DR. L. JACK BOLTON, DR. ROGER BYRNE, DR. TERRY R. DICKINSON, DR. WILLIAM J. KEMP, DR. CHARLES T. KU, DR. RONALD SHAMBLIN, DR. RANDOLPH D. MINATRA, WILLIAM S. NAIL, MICHAEL PITCOCK, DR. FRANK SANTOS *Defendants.*	)

ORAL DEPOSITION OF MICHAEL PITCOCK

[pp. 5-20]

DEPOSITION of MICHAEL PITCOCK, taken on the 25th day of February, 1997, between the hours of 9:24 o'clock and 12:42 o'clock P.M., in the Law Offices of Nicholas and Barrera, 424 East Nueva by La Villita, San Antonio, Texas 78205, San Antonio, Bexar County, Texas, before TAMMY ELLIS, a Court Reporter in and for the State of Texas, pursuant to Notice, the Federal Rules of Civil Procedure and the following stipulations:

STIPULATIONS

It is stipulated and agreed by and between counsel for the respective parties hereto that the original of the deposition of MICHAEL PITCOCK shall be sent to MICHAEL WINGET-HERNANDEZ for the purpose of obtaining the signature of the witness thereon before any notary public.

MICHAEL PITCOCK, the witness, having been first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

EXAMINATION BY MR. BARRERA:

Q. Could you please identify yourself for the record?

A. Michael Pitcock, P-I-T-C-O-C-K.

Q. And how are you presently employed?

A. I work for the Texas Lottery Commission.

Q. Okay. In what capacity?

A. I'm acting director of security.

Q. My name is Robert Barrera. I represent Dr. Robert Beck in this lawsuit. Have you ever been deposed before?

A. Yes, sir. I have.

Q. Okay. So, you're familiar with the question and answer scenario. If you don't understand my question, feel free to ask me to repeat it. You can confer with your attorney at any time. If you need to take a break for any reason, let me know and we'll take a break.

A. I understand.

Q. Okay. And as you have been doing, all your answers need to be audible so that the court reporter can take them down for the record clearly.

A. Okay.

Q. Okay. How long have you been employed with the Lottery Commission?

A. Since March 30th, I believe, of 1994.

Q. How did you get that job?

A. Through application, interview process and testing.

Q. Okay. Who is your supervisor there? Who do you report to?

A. Kim Kiplin is acting executive director at this time.

Q. Is she an attorney from Austin?

A. Yes, she is. She was general counsel for the lottery, and then she's been placed as acting executive director.

(Off-the-record discussion.)

BY MR. BARRERA:

Q. How were you employed before working at the Lottery Commission?

A. I worked for the Texas State Board of Dental Examiners.

Q. For how long?

A. From July 1st of 1986 to March 30th of 1994.

Q. You left the Dental Board to work for the Lottery Commission?

A. Yes, sir, I did.

Q. Okay. How did you get hired on at the Dental Board?

A. I was working for the Department of Public Safety prior to that and I applied through application and testing procedures, same as before, through qualifications.

Q. And what was your capacity with DPS?

A. My last position, I was a sergeant investigator - Internal Affairs DPS.

Q. Where were you stationed or assigned?

A. I was stationed in Austin, last assignment.

Q. How long had you had with DPS?

A. About 16 and a half years.

Q. And before DPS?

A. Well, I graduated from high school in '68 and I started DPS in '69, you know, when I turned 20. I went on to DPS from there.

Q. Okay.

A. Prior to that, I worked for my father. He was an electrician.

Q. Where did you go to high school?

A. I graduated from Willis High School.

Q. Where is that?

A. Just right out of Huntsville, Texas, between Huntsville and Houston on I-45; out of Conroe, about eight miles.

Q. Okay. Needless to say, you've had then 16 and a half years at least training in law enforcement?

A. That is correct.

Q. And familiar with investigative techniques?

A. Yes, sir, I am.

Q. Have you had any particular training in white collar - what is classified as white collar, fraud, law enforcement investigation?

A. Yes, I have.

Q. And could you explain that?

A. I graduated in the 132nd Class FBI National Academy. It's four and a half months of intensive training that gives a broad overview of white collar crime, amongst all the other crimes. I've attended several, you know, in-service schools while I was with DPS and with the Dental Board and with Texas Lottery Commission dealing with white collar crime.

Right now that's what we do at the lottery for the last three years is white collar crime investigation.

Q. How did you or what caused you to apply for working at the Dental Board?

A. It was the last four years at the DPS, I completed my education and college; and, plus I completed the FBI National Academy and I thought the Dental Board was a chance to better myself as an individual.

Q. Okay. Where did you go to get your college?

A. Saint Edward's University in Austin, Texas.

Q. You came on July 1, '86?

A. Yes, Sir, that's correct.

Q. Okay. Who - Did you make application with any particular person or just with the Board?

A. With the Board, the Texas -- It's a State application process through the Texas State Board of Dental Examiners.

Q. And who contacted you to let you know you had been employed?

A. I'm not sure if it was Mr. Nail or their employment person. I can't remember, but it was probably Mr. Nail, William S. Nail.

Q. Okay. When you first went into the employment with the Board, what was your job description?

A. To oversee the investigative section of the Dental Board.

Q. Okay. What was your title?

A. Assistant director.

Q. Assistant director?

A. Correct.

Q. Who did you report to?

A. Mr. Nail.

Q. What was his position?

A. Executive director.

Q. I want to jump ahead. What - what other positions have you held with the Texas Board of Dental Examiners?

A. I was assistant director, then senior investigator, then director of enforcement.

Q. Okay. Through what year were you assistant director?

A. I'm going to guess the first three years. Before Mr. - when Mr. Nail left, it stayed that. Then they reorganized when they got a new director and changed all the titles.

Q. That would have been in approximately '89?

A. Something like that. '88, '89. I'm not sure of the dates.

Q. Okay. And then you went to what position?

A. Senior investigator.

Q. Senior investigator?

A. Right.

Q. Was it the same job description, different title?

A. Same job description, same responsibilities, same everything.

Q. Okay. And you were in that capacity for how long?

A. Well, I mean, I was the same title, same job description, for the entire time I was there. You mean as the title "senior investigator," is that what you're asking?

Q. Right.

A. I don't remember. Probably another one year, two years, something like that.

Q. Okay. And then you had another shift in administration or what happened? Why did you end up with a new title?

A. Had another shift in administration. They had new Board members and they reorganized again.

Q. And your title became?

A. Director of enforcement.

Q. Okay. The same job description, same duties?

A. Same job description, same duties.

Q. Okay. So, from '86 through the time you left in '94, then you had the same responsibilities, duties and obligations throughout that entire time period.

Did you ever acquire additional job responsibilities as the time went on, duties that you didn't have when you started in '86?

A. Well, I'm sure the responsibilities changed. I can't say that I acquired new or – or – responsibilities, but when you reorganize, the Board members and the executive director had different, you know, performance measures. And, you know, or course, the State government has performance measures. So I undertook – You know, as we

evolved through time, I would say, yes, we did different things.

Q. Uh-huh.

A. But it was - Basically, the basic function of investigation was the same.

Q. Okay. And at all times, throughout that time period, then, did you report to the same - I don't want to say the same person because obviously it changed in '89, but to the same official?

A. That's a difficult question. We had Board secretaries. You now, when I did investigations, the Dental Board, we interacted with them, plus our executive director.

The Board secretary, when I first got there, was Dr. Santos. And then it changed to Dr. Shamblin, I believe, and Dr. - I can't think. Dr. Uribe was the last one. And Penn Jackson was right before him. So there was four Board secretaries I reported to also.

Q. Okay. The first one would have been Dr. Frank Santos?

A. Correct.

Q. He was the secretary?

A. Yes, sir, that's correct.

Q. Okay. Now you say you reported to him as opposed to William Nail, or did you report to both?

A. Both.

Q. Okay. What would have been the normal course of procedure? From whom would you have received your orders and authority to go and conduct an investigation or go to work?

A. From the general public.

Q. Okay. Let me rephrase that.

Who would have told you to go do a particular job assignment? Who had the authority to do so?

A. No - I did that. I was the director of enforcement or security. I told the investigators when to go based on complaints from the general public. I mean, I was the person that received the complaints.

Q. Okay. So you were In your own capacity there as investigator, law enforcement capacity or regulatory capacity, to decide what dentist got investigated and why?

A. Primarily, yes.

Q. Okay.

A. That's correct.

Q. Now, were these investigations based on -- only on complaints from the general public?

A. No.

Q. How were they initiated?

A. It was from, you know, other law enforcement agencies. Primarily, the general public would have been the -- the most common, other law enlorcement agencies, other regulatory agencies that we dealt with, other doctors that were in the profession and other miscellaneous -- different -- it was not only from the general public. We had different complaints coming from different directions. The impaired dental group, they -- they complained. There were several different ways.

Q. Okay. Did any of the members of the Board and/or the secretary have authority to tell you to go investigate a particular dentist or a particular complaint that did not originite from the public?

A. Did they have the authority to tell me to go investigate?

Q. Yes.

A. Not that I know of. They never did that. I don't remember any, other than the Board secretary would tell

us to do more investigation if he didn't think we were finished with one.

All the information like that would have been through the Board secretary, as far as I know. That's who we communicated with, you know, as far as investigations.

Q. Okay. Specifically, by way of example, did you ever receive any instructions from William Nail to go and investigate any particular complaint that had not been generated through the public?

A. I'm sure I did because if he received a phone call at the office from somebody in the general public, you know, that was generated through his -- his office, he would have passed a complaint down and said, "Go investigate it," you know.

In our office there's, you know, several phones. And people that would call in sometimes would get -- They would say, "I want to talk to the executive director and I want to complain on a dentist." So Mr. Nail and all the executive directors would talk to them. And then they would write down information and give it to me and we'd generate a complaint and go investigate it.

Q. Okay. What about any directive, or orders through the individual Board members themselves?

A. No. They would usually -- if they had somebody in their area -- call them and say they had a complaint, they would refer it to the Board office and we would take it just like we would any other complaint and take it into a complaint form.

Actually, we sent complaint forms to the individuals and they'd have to fill it out and send it back to us. But Board members -- they're scattered throughout the State of Texas. It would not be unusual for a person that knew the

Board member to call and say, "I want to complain against a dentist," because that happened.

Q. Yeah. And then that Board member's responsibility would be to do what?

A. To report it to the Board office just like anyone else and say –

Q. To - I'm sorry. To whom?

A. It could have been Mr. Nail or myself or-- I hate to say Mr. Nail because we had, you know, again --

Q. Yeah.

A. multiple directors.

THE COURT REPORTER: Slow down, please.

THE WITNESS: I'm sorry.

BY MR. BARRERA:

Q. Okay. And the -- Tell me about the routine when a complaint comes in from any source. What would have been the proper procedure -- Let me ask you one more question.

Are you familiar with the proper procedure in docketing complaints against a dentist?

A. Yes, I am.

Q. Did you participate in that procedure?

A. At what time? I mean, I don't understand your question.

Q. From -- During your tenure there as director of enforcement or investigator, how did you become familiar with the rules regarding the docketing of complaints against dentists?

A. Well, the administrative law process when I first got there was handled -- the docketing, as you're calling it –

Q. Right.

A. -- was handled by Mr. Nail. He was an attorney and he handled most of the actual docketing of complaints, if that's what you're asking.

Q. Okay. Did you handle any of the docketing of the complaints?

A. All I did was investigate. You know, I assisted in -- in calling witnesses. I don't understand what you mean. "Docketing" is such a big word.

Q. Okay.

A. But, you know, I assisted him. Like if he said he docketed a complaint against a certain dentist, he would say, you know, to call the dent – the – make arrangements for the witnesses and people to be there. I would assist in that area.

Q. Okay. Let me back up one more.

Assume I called to complain about Dentist Jones.

A. Correct.

Q. What would –

MR. WINGET-HERNANDEZ: Excuse me. I'm sorry. I'm sorry to interrupt you Bobby. It's just that it would seem appropriate to me for the -- since the witness has suggested that there may be a difference between what you're calling "docketing" –

MR. BARRERA: Yeah.

MR. WINGET-HERNANDEZ: -- and what he's calling "docketing" –

MR. BARRERA: Right.

MR. WINGET-HERNANDEZ: -- for that to be clarified.

MR. BARRERA: That's what I'm going to do right now.

MR. WINGET-HERNANDEZ: All right.

BY MR. BARRERA:

Q. Assume I had called in to make a complaint against Dentist Jones, what would be the normal procedure that you would go through in making that investigation?

Assuming you make a finding, then what's the next step? If you don't make a finding, what's the next step? Explain to me that, please.

A. We complete the investigation and turn it over to the Board secretary.

Q. Okay.

A. We just investigate the facts and let the Board secretary make the decision.

When I first got there, it -- you know, it was one of those processes that we had a form that we would send him and, you know, he would ask for it. If he wanted to review the file, he would ask for it.

At the end we would send in all the files to the Board secretary and they would review the ...

* * *

[pp. 45-52]

. . . phone book. I guess, you know, I had the number and I called Frank or Wayne called Frank.

Q. Okay. Do you know who called Frank?

A. No. I don't remember.

Q. Okay. Why Frank Perez?

A. Because he worked diversion.

Q. Okay. So, Frank Perez was part of DEA Diversion?

A. No. DPS.

Q. I mean, DPS. Is there DPS Diversion and DEA Diversion?

A. Correct.

Q. Okay. Frank Perez worked for DPS Diversion at the time?

A. He worked for DPS Narcotics and he worked diversion –

Q. Worked diversion.

A. -- Is the way you would say it. He worked other cases other than just diversion.

Q. Okay. And either you and/or Wayne or both of you – all contacted Frank because this would have been his region, his district, or why?

A. That's correct.

Q. Okay.

A. Region, district and proper protocol.

Q. Okay.

A. That's what you're supposed to do.

Q. And did the Board, did you, did Wayne Youngblood, separate and apart from having a DPS agent with you, have the authority to go in and do drug record counts?

MR. WINGET-HERNANDEZ: I have to object.

THE WITNESS: I don't understand your question. You asked the Board. You asked several different questions in one again.

BY MR. BARRERA:

Q. Okay. Well, you work for the Board?

A. Correct. For the State of Texas. I work for Texas.

Q. Okay. Let me rephrase.

Did you, as part of your job capacity, have the authority to enter a dentist's office to go through his records to do drug or narcotic counts?

A. Yes.

Q. Okay. Under what authority?

A. The Dental Practice Act.

Q. Okay. And did it -- Does that Dental Practice Act give you the authority to enter without a warrant?

A. Yes.

Q. Okay.

MR. WINGET-HERNANDEZ: Excuse me. Could I confer with the witness for just a moment? I'd like to know what his answer to your next couple of questions is going to be before you ask them. Just give me -- Just give me about a minute and I'll be right back.

(Recess taken.)

MR. BARRERA: Back on.

BY MR. BARRERA:

Q. I'd asked you whether or not you had the authority, as your job description and duty, to enter the office of a dentist and review records. And you said under the Dental Practice Act you did have that authority.

A. That's correct.

Q. Did you have that authority in July of '86?

A. That's correct.

Q. Okay. And was there a need in -- as far as your job description, in order to contact DPS in order to do your count of narcotics that you had -- you found unusual in Dr. Beck's office?

A. Most definitely.

Q. Why?

A. In my experience, again, as a narcotics investigator, in my experience as a law enforcement officer, the prescribing that Dr. Beck was doing was most unusual. In cases that I have seen and investigated, a lot of times that led to diversion of drugs to the streets that were sold out on the streets by this unusual practice. I think that the possibility

of criminal violations was there. And I think that being that we're not commissioned law enforcement at the Dental Board, I felt there was a need for a law enforcement that had commission to assist us just in case we identified possible criminal violations and take appropriate action since we did not have that authority.

Q. Okay. So you, on your own, based upon what information was provided to you, suspected the possibility of criminal activity and you wanted a law enforcement agent to accompany you on the investigation?

A. That's correct.

Q. Okay. In your mind were there any threat or fear of physical violence at the time you conducted the investigation?

A. Wayne Youngblood had mentioned about Dr. Beck carrying firearms and was, you know, common for him to do that. It was no fear on my part, no, but it was one that--for protection of both him and us. A concern, yes.

Q. Okay. I guess my question is more directed to: Was there a need for fire protection and that's why you took a DPS agent? What would have been the difference between you and Wayne Youngblood doing your investigation and turning over your findings to DPS for later investigation?

A. Again, I'll answer the same as I did. There was possibilities of criminal activity by Dr. Beck that needed to be investigated. And if we identified those as being criminal activity, the arrest procedure would have been Frank Perez's to take and file criminal charges and/or possibly arrest Dr. Beck if there was criminal violations.

Q. Okay. Did you, as part of your investigation, find any criminal violations?

A. Yes.

Q. What were they?

A. He failed to keep any ledger or any accountability of his drugs, which is a criminal violation, and his method of dispensing was in violation of the Controlled Substances Act, also. And I can't name every technical one, but there was several technical violations of the Controlled Substances Act that had criminal sanctions attached to it.

Q. Okay.

THE COURT REPORTER: Wait, wait. You've got to slow down for me.

THE WITNESS: I'm sorry.

BY MR. BARRERA:

Q. Are you aware of any criminal charges that were ever filed by Frank Perez or any outer DPS agent against Dr. Beck'?

A. No.

Q. Okay. Did the Board initiate, as a result of that investigation and your findings, any criminal investigation -- Excuse me -- any criminal complaint against Dr. Beck for any criminal violations alleged to have been found?

A. Not to my knowledge.

Q. Okay. Would that have been within your knowledge as the investigator and chief investigator at the time?

A. Yes.

Q. Okay. When you came down to San Antonio with Wayne Youngblood, you said you met with Frank Perez. Who else did you meet with?

A. I remember vaguely; and, again, it's a long time, that we met with the DEA Diversion group, as I said earlier.

Q. Okay. Any other individuals?

A. Not that I remember, no.

Q. Do you remember a Dr. Frank Santos?

A. Yes.

Q. Did you meet with Dr. Frank Santos?

A. I would say that's possible. He's the Board secretary. It wouldn't have been unusual. I don't remember meeting with Dr. Frank Santos, but wouldn't have been an unusual act on our part.

Q. To come down and inform him of what you're investigating and what you're doing?

A. It's possible that Wayne probably introduced me to him, you know, being that he was Board secretary and I've never seen the person before. And probably in the introduction, Wayne probably talked about the investigation to Dr. Santos.

Q. Uh-huh.

A. That wouldn't have been unusual either.

Q. Okay. So the contents of any conversation that may have been had in the presence of Dr. Santos, you have no recollection?

A. No.

Q. After you have this conversation with Frank Perez and Wayne Youngblood, how is the entry or the visit to Dr. Beck's office made to commence your investigation?

A. Just walked in the front door.

Q. Go through the steps that you took in terms of any documents you may have needed to acquire, what your plan was in entering. What was the situation in your investigation?

A. It was understood between the three of us that, you know, we were going to inspect his office about, you know, a drug. We'd already obtained, again, information from the DEA-222 forms and we also had triplicate information at that time, also, plus the pharmacy information, that we wanted to inspect some of his records, as far as

patients, and inspect and audit, basically, the drugs that he had ordered to see how many he had and how many he had dispensed, in light that it was possible –

Again, I'm DPS Narcotics. In light that it's possible criminal activity, Frank decided to – you know, to file a Notice of Inspection based on the possibility that he may need to, you know, take criminal action, based on that inspection. So we agreed that was fine.

And so we walked through the front door. We identified ourselves to his receptionist and said, . . .

* * *

[pp. 89-100]

. . . Blanche Hope -

A. No.

Q. Okay. -- who may be with –

A. DEA Diversion. I've heard her name, but I don't know her. I think that's where she's at.

Q. Okay. What about Susan Robinson?

A. No.

Q. What about Hank Bezrucik?

A. No.

Q. Donald Masters?

A. I know Donald Masters, the dentist, if that's the one you're talking about. I've heard of his name.

Q. How do you know him?

A. I just know him as a dentist.

Q. In what capacity have you made contact with him?

A. I don't think I've ever talked to Dr. Masters. I just know him by name.

Q. How did his name come up as opposed to 10 million other dentists who may be around?

A. That's my job for eight years is to know dentists. And he probably was either second opinion or he may have been complained on. I don't remember.

Q. Okay.

A. I just recog – You asked me did I recognize the name. I recognize the name. What from, I don't know.

Q. Okay. Were you present at the hearing of the Board at which time or subsequent to which time the license of Dr. Beck was revoked?

A. Yes.

Q. Did you view the presentation of the evidence against Dr. Beck?

A. View?.

Q. Did you listen to it?

A. Yes.

Q. Were documents tendered supporting any of the complaints as part of the evidence against Dr. Beck?

A. Yes.

Q. Envelopes allegedly containing letters of notice to Dr. Beck?

A. I don't specifically remember that, but –

Q. Okay. Where would the documentary evidence of the hearing -- Who would have -- Who would keep those? Where are those? Where would that evidence be?

A. Well, we were represented, I believe, by Bob Gauss or the Attorney General's office and I would assume that the court reporter would obtain the evidence. That's what I understood to be normal.

Q. Okay. Does the term "docketed complaint" have a meaning of art in your experience with the Dental Board?

Q. What does that mean?

A. That is the process where you actually bring a dentist in before a hearing before the Board.

Q. Okay. And who is responsible for preparing the docketed complaint?

A. During that period of time, or are you going to–

Q. Yeah, during that period of time.

A. That would have been Mr. Nail.

Q. Mr. who?

A. Nail.

Q. Mr. Nail. William Nail?

A. Right.

Q. Who would provide the information to William Nail to -- upon which the complaint was made?

A. Well, he chaired the informal conference and he, you know, directed it at a point. So, I would assume, based on the conference and the investigation and the information he received from the secretary, that he combined all that when he, you know, did a complaint. So, not one individual. It was a combination of all.

Q. Okay. Would Youngblood have turned over his report to William Nail for construction of the docketed complaint?

A. I'm sure it was, yes.

Q. Did you read the docketed complaint prior to its presentation to the Board?

A. I don't remember that.

Q. Would It have been part of your authority or practice to insure that the docketed complaint that is being tendered comports with the evidence that is going to be presented?

A. That would have been Mr. Nail's job. He may

have let me look at it just to review it.

Q. Okay. You don't recall whether he did or did not?

A. I don't remember that.

Q. Were you aware at the time of the Board hearing, wherein the license was revoked, of what allegations were being made against Dr. Beck?

A. I don't understand your question. Repeat it.

Q. The complaint sets forth the allegations which it alleged to be violations of the code or the rules, correct?

A. Correct.

Q. Were you aware of those allegations at the time of the hearing?

A. I heard them read them at the time of the hearing.

Q. Okay. And did you also hear the evidence that was presented allegedly supporting each of these complaints?

A. Yes.

Q. Okay. And, in your opinion, did the evidence support the complaints, based upon your investigation?

A. That wasn't my decision to make.

Q. Okay. I'm not saying it was. In your opinion, did the evidence support the complaints?

A. Gosh, you're making me be the judge. I'm not the judge. I just investigated.

Q. I'm not making you be -- I'm just asking you for your personal opinion.

A. I really don't want to answer that because I'm not the judge. I did the investigation and that was the Board's decision to judge and –

Q. Well, let me rephrase the question.

Was there evidence supporting each of the complaints? Did you hear evidence supporting each of the complaints?

A. Yes.
Q. Okay.

(Deposition Exhibit No. 14 marked.)

BY MR. BARRERA:

Q. Let me ask you to take a look at Deposition Exhibit No. 14, ask you if you can identify that as a copy of the Docketed Complaint filed against Dr. Beck?

A. I don't remember, you know, at this time, you know, whether that is or not the Complaint because I haven't seen it since, you know, again, early '86; but, you know, it looks to be something that would have been presented to the Board.

Q. Okay. You're familiar with what a complaint looks like?

A. That's correct.

Q. Okay. This Complaint purports to be signed by Wayne Youngblood and notarized before Kathleen Marshall on the 23rd of July of '87, correct?

A. That's correct.

Q. And it shows it was filed and docketed by Dr. Frank Santos on or about the 29th of July?

A. That's what that page says.

Q. Okay. And that's normal procedure for that type of routine to occur?

A. Yes, sir.

Q. Okay. William Nail would have been the person to choose the wording of the Complaint, the allegations and the alleged violations, correct?

A. I don't know if he would have been the only one. He may have conferred with the AG's office and their

attorney that represents us; but, you know, he would have been the one responsible for drafting the Complaint.

Q. Now, the complaints in Deposition Exhibit No. 14, according to the proper procedure, would all have had pre-hearing conferences regarding each of the complaints, correct?

A. That's correct -

Q. Okay.

A. -- after July 1st of 1986. Any complaints before that time, I don l know.

Q. Right. Okay. Now, you have -- or there is listed in here, under Roman Numeral No. II, the complaint that "On January 15th, 1986, Respondent prescribed, for himself, tablets of Empirin No. 3 as follows." And ask you to take a look at any of the evidence or all of evidence and tell me what evidence you have to support the fact that Dr. Beck prescribed this medicine to himself.

A. Okay. Can I see the report?

Q. You can see everything. I tender you Exhibits 1 through 13 for your review.

A. I just need the Investigative Report.

Q. That would be No. 12.

MR. WINGET-HERNANDEZ: Now, are we supposed to be -- Are we supposed to be guessing here what evidence was submitted to the -- to the Board, or you just want to know based upon what these exhibits are that you've marked which of them constitutes evidence of that?

BY MR. BARRERA:

Q. Based upon whatever evidence you found as a result of your investigation, what evidence was presented to the Board that Dr. Beck self-prescribed these pills to himself?

A. I don't recognize this document, but it's got a label to Dr. Beck (indicating).

Q. Uh-huh.

A. And if you read that there, it says every one of those were prescribed to Dr. Beck (indicating).

MR. WINGET-HERNANDEZ: The record should reflect that the witness has referred to Deposition Exhibit No. 6 and Deposition Exhibit No. --

MR. BARRERA: No. 12, the last page.

MR. WINGET-HERNANDEZ: -- 12.

BY MR. BARRERA:

Q. Okay. Now, let's talk about Depo Exhibit No. 6, which you do not recognize; but are you familiar with Olmos Pharmacy?

A. Yes.

Q. Okay. As being a pharmacy that is supposed to be located near Dr. Beck's office?

A. Correct.

Q. Is that the one that you're referring to that Youngblood referred to?

A. There is an Olmos. I'm not familiar with all the Olmos Pharmacies. I'm not sure if there's more than one or not.

Q. Okay.

A. But I know about the one next to Dr. Beck's office there.

Q. Okay. It shows an address of Dr. R. L. Beck. It looks like 417 East Mandalay.

MR. BECK: That was --

THE COURT REPORTER: That was what?

MR. WINGET-HERNANDEZ: That was the home address.

MR. BARRERA: Home address.

BY MR. BARRERA:

Q. And on the same label, it says "For office use, Empirin No. 3, 30 milligram tablets," correct?

A. That's correct.

Q. Okay. This notation is what you're saying is evidence of the fact that Dr. Beck prescribed these for himself?

A. That's correct.

Q. Okay. The last page of Depo Exhibit No. 12, being a -- it looks to be a computer printout generated by Olmos Pharmacy at 3902 McCullough is, what, the other evidence you're relying upon to show that Dr. Beck prescribed these for himself?

A. It's got his name on it, that's correct.

Q. Okay. Now, as part of your investigation and part of the -- Where's Youngblood's report?

A. Right here (indicating). I'm sorry. Oh, I'm sorry.

Q. Oh, here it is (indicating). Well, while I'm looking, you are familiar with the investigation on July 7th, 1986, wherein records dealing with the prescription of Empirin were found, correct?

A. Yes.

Q. Okay. So you had evidence indicating and showing that these Empirin tablets had, in fact, quite a few of them, been prescribed to patients and you had the charts supporting that, correct?

A. No.

Q. You had no charts supporting -

A. On the date, the 7th, when we went in?

Q. Yes.

A. No.

Q. You had none?

A. I didn't say none. We didn't have charts supporting his prescriptions.

Q. Of any Empirin at all?

A. You know, I don't recall. He could have presented some; but, you know, not enough to convince, you know, the -- You know, again, when you look at a totality of the amount of drugs that he's ordered, there wasn't enough charts to support however many he actually should have had supporting it versus how many he ordered in his office, no. I'm not saying he didn't have no charts. He had charts for some.

Q. Okay. And it the pre-hearing conference on or around August 2lst wherein you provided him with the opportunity to bring additional documents and supplementation, did he, in fact, bring some documents and supplementation per your request?

A. Yes.

Q. And did those patient charts and cards indicate prescriptions of Empirin tablets?

A. I don't recall. I'm sure they did.

Q. Who did he provide those records to?

A. Again, Mr. Nail was in charge of the conference. He would have presented them to Mr. Nail when he was questioning him about those issues.

Q. Okay. And did you review those to make those a part of your records?

A. A part of the actual file. I don't -- I didn't have a record personally, if that's what you're saying.

Q. What was your involvement in the investigation?

A. You asked that right at the very beginning. I was there to watch Wayne Youngblood investigate as his supervisor.

Q. So you personally made no records, no notations of this investigation?

A. I was not the investigator. This was ongoing when I got to the Dental Board. This investigation had started prior to July 1st. When I got there, I just went with Wayne because he gave me a brief of what he was doing. I've said this before.

Q. Okay. Now, assuming Wayne Youngblood – Do you know if Wayne Youngblood was provided with these . . .

* * *

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. . . or the delivery of notice to Dr. Beck regarding the hearing at which his license was revoked?

A. It's possible.

Q. Do you recall it?

A. I don't recall it. We had a very small staff; so, you know, we all had to do work.

Q. Do you - Would It be a part of the ordinary routine practice/procedure of conducting investigations that Board members would participate in the investigations?

A. No.

Q. Would it be out of the ordinary?

A. Out of the ordinary. It didn't happen.

Q. Didn't happen?

A. No.

Q. Okay.

A. As far as when I was there. Let me qualify, from July of '86. I can't speak -- because the Board was in existence many years before

Q. Right.

A. So I don't know what their responsibility was before that.

Q. Okay. Other than DPS end DEA Diversion, what other regulatory agency, have you worked with while investigating dentists?

A. Pharmacy Board, Podiatry Board, just - RN Board, LVN Board. Almost every one that dealt with medical professionals in one sense or another.

Q. Okay. Would it have been proper for the secretary, at any point, to participate in the investigation?

A. To participate? Now you have to qualify what you mean. I don't understand.

Q. Well, other than in taking the complaint, receiving the complaint, putting the information together for the secretary to go out and investigate?

A. No.

Q. Initiate contact with witnesses, things of that nature?

A. No. He would have told us to do that.

Q. Were you personally involved in any type of lobbying effort on behalf of the Board with the legislature?

A. I don't lobby. I'm just an investigator, a cop, you know. I wouldn't be good at it, no.

Q. Tell me about the investigation regarding Roger Byrne and his prescribing, self-prescribing, cocaine.

A. About the investigation?

Q. Yeah.

A. I don't know if there ever was one.

Q. Okay.

A. That was prior to my time, you know. I know -

Q. What do you know about it?

A. Well, Wayne Youngblood had a 222 form that was dated back in like '7Os.

Q. Uh-huh.

A. And he made me aware of that, you know, that he had it. And I asked him, "What does it mean?" And he couldn't qualify it. I mean, to me, it was -- it didn't mean anything because it was routine for oral surgeons to prescribe cocaine.

Q. To themselves?

A. For office use, yeah, for a 222 form.

You're -- You're asking a different type question. They use that. You know, oral surgeons use it today, as far as I know.

Q. So, it's routine, then, for I doctor to prescribe something to himself for office use?

A. It's not prescribing to himself. It's different. Because a 222 form is to himself, based on his DEA license.

Q. Okay.

A. You're twisting it to mean something it doesn't mean.

Q. Okay. Is the 222 form what's, delivered to the pharmacy?

A. No. The 222 form can go to the drug manufacturer itself. It doesn't have to go through a pharmacy.

Q. Okay.

A. It's just routine ordering of drugs by a doctor, pharmacist or anybody that has a license to order drugs. That's what you normally would use.

Q. So, it would go down just like exhibit -- the last page of Depo Exhibit No. 12, ordered to Dr. Beck for Dr. Beck for office use? That would be routine, just like you just testified with the cocaine?

A. This is not routine, no.

Q. The ordering?

A. The ordering of drug is routine. You're – Again, this is a pharmacy.

Q. Uh-huh.

A. You know, he ordered these drugs based on a prescription out of his office, not a 222 form.

Q. Okay.

A. There's a big difference in how you do that. Doctors –

Q. Okay.

* * *

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. . . subject. If the attorneys have discussed it, then there's no need for a pre-hearing conference.

MR. BARRERA: I'm just asking.

MR. WINGET-HERNANDEZ: Well --

BY MR. BARRERA:

Q. Is it part of your responsibility or not?

A. If I was instructed by Mr. Nail. you know. I would have sent whatever issues that he wanted to discuss. Again, there was issues that he was involved in before I got there and then –

MR, WINGET-HERNANDEZ: "He" being Dr. Beck?

THE WITNESS: Dr. Beck, that I -- I, you know, didn't know all the details to.

BY MR. BARRERA:

Q. Okay. So, then, Mr. Nail would have been the person who, in regards to Dr. Beck, would have been

controlling most of the conduct that you took with regards to Dr. Beck?

A. As far as what?

Q. As far as putting evidence together, sending him notices, conducting your investigation, directing you?

A. The investigation, as far as the information on the 7th, you know, I was aware of what was going on. As far as the actual complaint process on the Administrative Procedures Act, that would have been Mr. Nail's responsibility.

Q. Okay.

A. And some of the other information if it happened, you know, during the time -- Again, Wayne was investigating Dr. Beck before I got there.

Q. Uh-huh.

A. So I can't tell you before I got there as to who was responsible for what. I can tell you only when I got there what I did.

Q. Right. Okay. That's all I have. Thank you very much.

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AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared MICHAEL PITCOCK, who after being duly sworn. states that he has read the foregoing deposition transcript, and states that he wishes to make the following corrections and changes to the transcript for the following reasons:

PAGE LINE CHANGE REASON FOR CHANGE

He further states that the deposition transcript is otherwise true and correct.

MICHAEL PITCOCK
THE STATE OF
COUNTY OF

SUBSCRIBED AND SWORN TO BEFORE ME on this the _____ day of _____ ,1997.

THE STATE OF TEXAS
COUNTY OF BEXAR

I, TAMMY ELLIS, a Notary Public duly commissioned and qualified in and for the County of Bexar, State of Texas, do hereby certify that, pursuant to notice of counsel, there came before me on the 25th day of February, A.D. 1997, at 9:24 o'clock A.M., at the Law Offices of Nicholas and Barrera, 424 East Nueva by La Villita, San Antonio, Texas, 78205, the following named person, to wit: MICHAEL PITCOCK, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to computer-aided transcription by me and/or my supervision; that the deposition is a true record of the testimony given by the witness; and that the said witness read the same and subscribed his name thereto.

I further certify that I am neither attorney or counsel for, nor related to or employed, by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Dated February 20, 1997]

No. SA94CA0279

ROBERT LEE BECK, M.D., D.M.D.	)
v.	)
THE TEXAS STATE BOARD OF DENTAL EXAMINERS, ET AL	)

* * * * * * * * * *

VIDEOTAPE DEPOSITION

OF

ROBERT LEE BECK, M.D., D.M.D.

FEBRUARY 20, 1997

VOLUME 2

* * * * * * * * * * *

* * *

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. . . did wrong to you and that you're trying to get his money for.

Are you – tell me what it is that you mean, as concisely as you can, by your allegation that the notice itself fell short of what was required.

A: The notice did not state the authority under which this hearing was being called. It did not state the reason for which it was being called. It did not contain any of the complaints or allegations against me. It did not contain any of the violations of rules and regulations or statutes under which it was being called. The requirement that it met was telling me that there was going to be a hearing on that date. It told me nothing about what I had to defend against, what the charges were, under what authority he was doing that, for what reason I was being required to appear before the board, any of those things.

Q. With reference to all of these allegations that you are making about the insufficiency of notice –

A. Yes.

Q. – you are referring to the letter of September 10th of 1987, are you not?

A. That is correct.

Q: Okay. You are not suggesting that the material which was apparently conveyed to you be certified mail and . . .

* * *

APPENDIX L

AFFIDAVIT OF WAYNE YOUNGBLOOD

STATE OF TEXAS
COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, personally appeared Wayne Youngblood known to me, who upon being duly sworn upon his oath by me, deposed and said:

1. I am over eighteen years of age, have personal knowledge of the statements contained herein and am otherwise capable of making this affidavit.

2. I was an investigator for the Texas State Board of Dental Examiners (the "Board") for some twenty plus years.

3. My work with the Texas State Board of Dental Examiners was 1961-1965 and 1971-1990.

4. I was involved in the investigation of Dr. Robert L. Beck that ultimately resulted in the Agreed Board Order.

5. Alter Dr. Robert L. Beck joined into the lawsuit filed by Dr. Akins in Austin to require the Texas State Board of Dental Examiners to permit Texas Dentists to advertise, Dr. Beck was the subject of many

conversations among the dentists serving on the Texas State Board of Dental Examiners as well as Michael Pitcock. This was the case through my term of employment with the Board.

6. I repeatedly heard Michael Pitcock state that "the Board wants to get Beck."

7. From the comments I heard among Board members and Michael Pitcock, it was clear to me that the dentists on the Board did not like dental advertising.

8. The dentist members of the Board, along with Michael Pitcock, demonstrated repeated animosity toward three advertising dentists, Dr. Akin of Austin, Dr. Solomon and Dr. Beck of San Antonio.

9. I recall former lay board member Clara Hoffman asking why Dr. Beck was always talked about by the dentist members of the Board outside the formal hearing process.

10. The investigation at Dr. Beck's office in 1986 in which I participated with Frank Perez and Michael Pitcock was instituted by the Board and not by a patient complaint.

11. We were at Dr. Beck's office for one-and-a-half hours.

12. A drug count was done in the office.

13. Michael Pitcock told Dr. Beck that if he had other records they could be submitted to the Board and the Board would review them.

14. I told Dr. Beck that if he had additional information and could get it to me I would see that it got into the file.

15. I later received additional information from Dr. Beck regarding prescription drugs.

16. I was told by Michael Pitcock, who was my supervisor at the time, "Go ahead and do an audit count on this."

17. I did a drug audit with the additional information supplied by Dr. Beck. The result of the drug audit differed from the initial count done in Dr. Beck's office.

18. I told Michael Pitcock about the audit with Dr. Beck's additional information. Michael Pitcock told me that "We'll disregard it because it won't make any difference."

19. While I worked as a Board investigator I was told to cease work on more serious violations, including the dental practice without a license, in order to pursue Dr. Beck.

20. Attached as Exhibit A is a true and correct copy of my prior statement given on February 5, 1994.

Affidavit says nothing further.

/s/_____
Wayne R. Youngblood

Sworn to and subscribed before me on the 22nd day of February, 1995.

/s/_____
Julie A. Jordan
Notary Public, State of Texas

APPENDIX M

IN THE DISTRICT COURT
BEXAR COUNTY, TEXAS
285th JUDICIAL DISTRICT

[Dated April 1, 1992]

No. 88-CI-06246

ROBERT L. BECK, D.D.S.)
Plaintiff)
)
v.)
)
TEXAS STATE BOARD OF)
DENTAL EXAMINERS,)
Defendant)
)

AGREED JUDGMENT

On this 1st day of April, 1992, came on to be considered Defendant's and Plaintiff's Joint Motion for Entry of Agreed Judgment. The parties were represented by their counsel of record. After remand of this cause by Order dated December 13, 1990, the parties negotiated and settled the issues in dispute raised in Board Complaint No. 1987-39. This agreement has been reduced to writing in Agreed Board Order No. 1987-39, which is attached as Exhibit A and is incorporation hereby by reference as if set forth fully herein. Having reviewed the pleadings, evidence, and argument of the

parties relative to the Joint Motion for Entry of Agreed Judgment, the Court is of the opinion and finds Agreed Board Order No. 1987-39 is final and enforceable in all respects, and the issues raised by this cause moot.

It is therefore ORDERED, ADJUDGED and DECREED that Agreed Board Order No. 1987-39 is affirmed and is final and enforceable and that this cause, being moot, is dismissed.

It if further ORDERED that costs of court be assessed against Defendant for which execution shall issue if not paid.

SIGNED this 1st day of April, 1992.

/s/_____
JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

For the Plaintiff

/s/_____
GERALD E. SMITH
Bar No. 18596800
10604 Pinehurst Drive
Austin, Texas 78747
(512) 280-8065

For the Defendant

/s/_____
BROOKS WM. (Bill) CONOVER, III
Assistant Attorney General
Bar No. 04705800
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120
FAX (512) 447-0511

APPENDIX N

THE STATE OF TEXAS
FINDINGS AND ORDERS OF THE BOARD
COMPLAINT AND DOCKETED COMPLAINT

[Dated December 11, 1987]

No. 1987-39

TEXAS STATE BOARD OF DENTAL EXAMINERS	)
v.	)
ROBERT L. BECK, D.D.S. 4118 McCOLLOUGH, SUITE 17 SAN ANTONIO, BEXAR COUNTY, TEXAS 78212 HOLDER OF TEXAS DENTAL LICENSE NUMBER 7,913	)

I.

BOARD ORDER

On the 6th day of November, 1987, the Texas State Board of Dental Examiners met at the Embassy Suites Hotel, 5901 North IH-35, Austin, Travis County, Texas, for the purpose of hearing and considering the instant Docketed Complaint No. 1987-39, as well as for the transaction of other

business. A quorum and a majority of the membership of the Texas State Board of Dental Examiners were present, to wit:

Dr. L. Jack Bolton, President
Dr. Randolph D. Minatra, President-Elect
Dr. William J. Kemp, 1st Vice-President
Dr. S. H. Rabon, 2nd Vice-President
Dr. Frank Santos, Jr., Secretary-Treasurer
(present, not voting)
Dr. Roger P. Byrne
Dr. Terry D. Dickinson
Mrs. Clara Hoffman
Dr. Charles T. Ku
Dr. Ronald H. Shamblin
Mrs. Mary Spinks
Mrs. Evelynne Vick (absent excused)

II.

The President called said Docketed Complaint for hearing. The State announced "Ready", and the RESPONDENT, ROBERT L. BECK, D.D.S., although officially notified of the time and place of the scheduled hearing, wholly failed to appear. Counsel for the Board, Robert W. Gauss, entered a plea of "NOT TRUE" for the RESPONDENT. The Board proceeded to hear evidence, render a decision, and issue a Final Order.

FINDINGS OF FACT

1. Dr. Robert L. Beck, RESPONDENT of San Antonio Texas, is a practicing dentist in the State of Texas and is the holder of Texas Dental License No. 7,913.

2 RESPONDENT, prior to the docketing of a formal complaint No. 1987-39, was given the opportunity to be heard pursuant to section 18c, Article 6252-13a, VCYS, the Texas Administrative Procedure and Texas Register Act.

3. RESPONDENT was duly notified at his record address, of this scheduled hearing.

4. RESPONDENT was mailed a copy of Docketed Complaint No. 1987-39 at his record address.

FIRST CONCLUSION OF LAW

The Texas State Board of Dental Examiners had jurisdiction and authority, pursuant to Article 4549, Section 3, VTCS, to revoke the dental license of RESPONDENT.

FINDINGS OF FACT

5. Pursuant to a physical inventory, conducted on July 7, 1986, the RESPONDENT had a shortage of twenty-seven (27) 10 mg. Valium tablets.

6. Valium is a Schedule IV Controlled Substance.

SECOND CONCLUSION OF LAW

The allegation that RESPONDENT violated Article 4549, Section 3(j), VTCS, by failing or refusing to comply with the Board Rule No. 109.144(c) in that RESPONDENT failed to make a part of any patient's dental record of the dispensing, administration, or prescribing of narcotic drugs, dangerous drugs, or controlled substances, is TRUE.

FINDINGS OF FACT

7. From on or about January 15, 1986 until May 16, 1986, RESPONDENT prescribed to himself Two Thousand Five Hundred (2,500) Empirin No. Three tablets.

8. Empirin Three is a Schedule III controlled substance.

THIRD CONCLUSION OF LAW

The allegation that RESPONDENT failed or refused to comply with Article 4551h, in that he prescribed, provided, obtained, ordered, administered, possessed, dispensed, gave or delivered to himself, dangerous drugs which were not necessary or required or where the possession of same would promote or further addiction thereto, is TRUE.

FINDINGS OF FACT

9. From on or about January 14, 1985 to March 15, 1986, RESPONDENT obtained four hundred and twenty-five (425) 50 mg. Seconal tablets; the records of RESPONDENT reflect that three hundred and fifty three (353) of such tablets were dispensed to patients. A physical inventory on July 7, 1986 revealed nine tablets on hand, leaving a shortage of sixty-three (63).

10. Seconal is a Schedule II Controlled Substance.

FOURTH CONCLUSION OF LAW

The allegation that RESPONDENT has failed or refused to comply with Board Rule 109-104(c) in that RESPONDENT failed to make a part of any patient's dental record of the dispensing, administration or prescribing of narcotic drugs, dangerous drugs or controlled substance, is TRUE.

FINDING OF FACT

11. On or about September 23, 1985, RESPONDENT held Dr. John H. Hatton, a fellow dentist, at gunpoint against the will of Dr. Hatton, under the threat of death unless Dr. Hatton signed certain papers.

FINDING OF FACT

12. On or about October 25, 1985, RESPONDENT caused Dr. David H. Masters, a fellow dentist, to become in fear of his life because of threats directed to Dr. Masters.

FIFTH CONCLUSION OF LAW

The allegations that RESPONDENT was guilty of dishonorable conduct in that his conduct violated the standards of professional behavior which through professional experience has become established by the consensus of professional opinion and being inimical to the protection of public health, welfare or interested, are TRUE.

ORDER

BE IT KNOWN that on the 6th day of November, 1987, a quorum of the Texas State Board of Dental Examiners have voted, by majority vote, to REVOKE Texas Dental License Number 7,913, in consequence of the Second Conclusion of Law, to become effective upon this Order's becoming final.

IT IS FURTHER ORDERED that, in consequence of the Third Conclusion of Law, License Number 7,913 heretofore issued to RESPONDENT is REVOKED such revocation to become effective immediately upon this Order's becoming final.

IT IS FURTHER ORDERED that in consequence of the Fourth Conclusion of Law, License Number 7,913 heretofore issued to RESPONDENT is REVOKED, such revocation to become effective immediately upon this Order's becoming final.

IT IS FURTHER ORDERED that in consequence of the Fifth Conclusion of Law, License Number 7,913, heretofore issued to RESPONDENT, is REVOKED, such revocation to become effective immediately upon this Order's becoming final.

IT IS ACCORDINGLY ORDERED that License Number 7.913, hereto issued to ROBERT L. BECK, D.D.S., is hereby REVOKED.

EXECUTED this 11th day of December, 1987

/s/_____ 12/5/87
DR. L. JACK BOLTON
PRESIDENT

/s/_____ 12/5/87
DR. RANDOLPH D. MINATRA
PRESIDENT ELECT

/s/_____ 12/5/87
DR. WILLIAM J. KEMP
1ST VICE PRESIDENT

/s/_____ 12/5/87
DR. S. H. RABON
2ND VICE PRESIDENT

/s/_____ 12/5/87
DR. FRANK SANTOS, JR.
SECRETARY TREASURER
(PRESENT, NOT VOTING)

/s/_____ 12/5/87
DR. ROGER P. BYRNE

/s/_____ 12/5/87
DR. TERRY D. DICKINSON

/s/_____ 12/5/87
MRS. CLARA HOFFMAN

/s/_____ 12/5/87
DR. CHARLES T. KU

/s/_____ 12/5/87
DR. RONALD H. SHAMBLIN

/s/_____ 12/5/87
MRS. MARY SPINKS

/s/_____ 12/11/87
MRS. EVELYNNE VICK
(ABSENT EXCUSED)

APPENDIX O

COMPLAINT AND DOCKET COMPLAINT

[Dated November 6, 1987]

NO. 1987-39

TEXAS STATE BOARD OF DENTAL EXAMINERS	)
v.	)
ROBERT L. BECK, D.D.S. LICENSE NO. 7913	)

Friday,
November 6, 1987
Embassy Suites Hotel
5901 North IH-35
Austin, Texas

BE IT REMEMBERED that on Friday, the 6th day of November, 1987, the above-entitled matter came on for hearing before the Texas State Board of Dental Examiners; and the following proceedings were reported by Linda Cameron, a Certified Shorthand Reporter.

BOARD MEMBERS:
L. Jack Bolton, D.D.S., President
Frank Santos, Jr., D.D.S.

Terry D. Dickinson, D.D.S.
Randolph D. Minatra, D.D.S.
S. H. Rabon, D.D.S.
William J. Kemp, D.D.S.
Charles T. Ku, D.D.S.
Roger P. Byrne, D.D.S.
Ronald H. Shamblin, D.D.S.
Clara G. Hoffman
Evelynne Vick
Mary Spinks

Robert Gauss, Attorney for Board

* * *

[pp. 5-6]

QUESTIONS BY MR. GAUSS:

Q I'll hand you what has been marked as Board Exhibit No. 1, and ask you to identify that for the Board.

A This is an acknowledgment receipt of a letter dated August 4, 1987 in Docketed Complaint No. 1987-39, addressed to Robert L. Beck, D.D.S. This letter and docketed complaint were delivered to the following address: 4118 McCullough, Suite 17, San Antonio, Texas 78212, and it was signed by Linda De La Garza. It was the signature of an agent for the addressee. On September 9, 1987 at 1:15 p.m., I delivered it.

Q All right. You personally delivered this?

A Yes, sir.

Q And did that letter contain the notice if this hearing today?

A Yes, sir.

Q Along with the copy of the complaint?

A Yes, sir.

Q Have any efforts been made more recently to continue to contact Dr. Beck?

A Yes, sir. Mr. Pitcock and I both have on numerous occasions tried to telephone the office, left word with the receptionist for Dr. Beck to call us back, and I have not received any phone calls in return. I do not know what Mr. Pitcock has received.

Q Were letters sent by registered or certified mail to Dr. Beck enclosing copies of this complaint and the notice, of this hearing?

A Yes, sir.

Q One or more than one?

A I believe there's two in the file that were both returned to us.

Q Were these mailed to his record address as reflected by the Board's records in Austin?

A Yes, sir.

Q All right, sir. Now, I'm going to show you what I'm going to ask the Reporter to mark as Exhibits 2 and 3.

(Board Exhibit No. 2 and 3 were marked for identification.)

QUESTIONS BY MR. GAUSS:

Q And I'll ask you to identify these instruments, but, first, No. 2.

A This is a certification by Mr. Larry Taylor, the Department of Public Safety, who is head of the Triplicate Prescription Program of the Narcotic Service. And it's a certification on the triplicate prescriptions that were filled out and returned to DPS by Robert L. Beck, as well as the prescription that he had ordered.

Q All right. And Exhibit No. 3.

A This is the same type of certification. This is

. . .

* * *

[pp.16-17]

. . . and will testify.

DR. BOLTON: Any other questions of Mr. Youngblood?

(Board Exhibit No. 5 and 6 were marked for identification.)

QUESTIONS BY MR. GAUSS:

Q Mr. Youngblood, I'm going to hand you what has been marked as Board Exhibit No. 5 and No. 6, and ask you if you will identify those documents, please, sir. Number 5 first.

A These are envelopes from the Board of Dental Examiners, and I'm looking for the date right now. I believe it was dated August 4, 1987, and it was sent to the address of 4118 McCullough, Suite 17, Robert L. Beck, and it was registered mail and it was returned unclaimed.

Q All right, and No. 6.

A This is also an envelope from the Texas State Board of Dental Examiners, and it was dated August 13, 1987. It was also addressed to Robert L. Beck, D.D.S., 4118 McCullough, Suite 17, San Antonio, and it also was returned unclaimed.

Q And is that 4118 McCullough the record address of Dr. Beck as it -- as reflected by the records of the Texas State Board of Dental Examiners office in Austin?

A Yes, sir, and it has been for the last six years, because I've investigated him on numerous occasions.

Q Now, these envelopes are empty. Can you testify of your own knowledge what was in those envelopes?

A My own knowledge would be that the hearing date and a copy of the complaint was in them.

Q All right, sir.

MR. GAUSS: We would offer these, Mr. President, No. 5 and No. 6. I don't believe you'd want to see this one.

DR. BOLTON: I don't think so.

(Board Exhibit No. 5 and 6 were admitted into evidence.)

MRS. SPINKS: May I ask a question now?

DR. BOLTON: Sure.

MRS. SPINKS: Mr. Youngblood?

THE WITNESS: Yes, ma'am.

MRS. SPINKS: I'm a little confused here about these envelopes. They were unclaimed and they came back to the office and you removed the contents, or the contents were removed at the Post Office?

THE WITNESS: No, the contents was removed by our board staff.

MRS. SPINKS: Okay. I was concerned about the envelopes being empty.

* * *

[pp. 20-21]

MR. GAUSS: We offer No. 7 and No. 8.

(Board Exhibit No. 7 and 8 were admitted into evidence.)

MR. GAUSS: I have no further questions of this witness at this time. If the Board has any further questions.

DR. BOLTON: Any other questions of the Board of Mr. Youngblood?

DR. KU: Wayne, you know you did that physical inventory. Where's the other -- you meant there's a shortage of 63. Where did the others go? Did you check the patients' file?

THE WITNESS: I did not check the patient files, because he never did furnish them to us. He gave us -- he gave us cards and that's what we had to go by.

DR. BOLTON: So, you took it from his inventory.

THE WITNESS: Yes, sir.

DR. BOLTON: All right. Any other questions of Mr. Youngblood? Yes, sir.

DR. BYRNE: How was this complaint initiated and why did these two people that are going to testify at a later time become involved? Who in the local dental society picked

this problem up, and how did they pick it up? And give me a little history on it.

THE WITNESS: Okay. Dr. Beck had been, I would say, at that office for a number of years. There was an instance that came to my attention -- Dr. John Hatten, who will be here to testify, called me one day and said that an incident had happened that he wanted to tell me about, and so, I believe, a day later or two days later, or it might have been three days, I met him in San Marcos, Texas, and he gave me some information on some things that were to do with advertising and some complaints and some other information. I also questioned him about Dr. Beck, and after that conclusion, to me -- it drew a conclusion for me that I needed to check on his drugs, and so I did, then go to the pharmacy and check the pharmacy.

DR. BYRNE: But how did -- was Dr. Hatten the one that initiated the whole situation here?

THE WITNESS: Not the whole situation. But as far as the drug complaint was concerned, I initiated that. It was just some of the things that he told me that would draw the conclusion to me that I needed to check this man out.

DR. BYRNE: Dr. Hatten was not a representative of the San Antonio Dental Society or anything like that?

THE WITNESS: No, sir.

* * *

APPENDIX P

TEXAS STATE BOARD OF DENTAL EXAMINERS

INVESTIGATIVE REPORT

* * * * *

TEXAS DEPARTMENT OF PUBLIC SAFETY
NARCOTICS SERVICE
CRIMINAL LAW ENFORCEMENT DIVISION

Notice of Inspection of Controlled Premises

&

Inventory

TEXAS STATE BOARD OF DENTAL EXAMINERS

INVESTIGATION REPORT

SUBJECT	LOG NUMBER	INVESTIGATOR
Robert L. Beck, D.D.S.		Michael G. Pitcock

DATE	ACTIVITY
07/08/86	Inventory of Dr. Robert L. Beck's Triplicate Prescription practice from
	06/19/85 through 07/07/86.
	Demerol - 1000 units on 61 prescriptions
	No office supply.
	Seconal - 300 ordered through DEA Form 222's since "10/31/85".
	- 87 units on 44 prescriptions
	- 9 units in office
	204 units unaccounted for
	Percodan - 88 units on 9 prescriptions
	No office supply.
	Percocet - 8 units on 1 prescription
	No office supply
	Valium - Log Record.
	800 units ordered.
	8 units of 10 mg. dispensed.
	2 units of 5 mg. dispensed
	176 units in office on 07/07/86

INVESTIGATORS RECOMMENDATIONS/INSTRUCTIONS

OFFICE USE

EXHIBIT

7

157a

BEST AVAILABLE COPY

TEXAS DEPARTMENT OF PUBLIC SAFETY
NARCOTICS SERVICE
CRIMINAL LAW ENFORCEMENT DIVISION

NOTICE OF INSPECTION OF CONTROLLED PREMISES

TEXAS DPS USE ONLY
FILE NUMBER

158a

NAME OF INDIVIDUAL: Robert L. Beck	TITLE: D.M.D, M.D.	
NAME OF CONTROLLED PREMISES: Robert L. Beck Office & Assoc.	TEX. CSA REGISTRATION NO.: 8001208 9	
NUMBER AND STREET: 4118 McCullough, Suite # 17		
CITY AND STATE: San Antonio, Texas ZIP CODE: 78212.	DATE: 07-07-86	TIME (initial inspection): 3:10 PM

ACKNOWLEDGEMENT

I, Robert L. Beck (Name) have been advised

by Texas D.P.S. Francisco G Perez - Investigator, Narcotics Service (Title and Name)

has identified himself to me with his credentials and presented me with this Notice of Inspection containing a copy of sections 5.01 of the Controlled Substances Act, (Art. 4476-15, V.A.C.S.) and Chapter 8 of Rules adopted pursuant to Article 4476-15, V.A.C.S., printed hereon, * authorizing an inspection of the above described controlled premises. I hereby acknowledge receipt of this Notice of Inspection and of the waiver executed at the time of my application for my permit. In addition, I hereby certify that I am the OWNER/LESSEE (President) (Manager) (Owner)

for the premises described in this Notice of Inspection; that I have read the foregoing and understand its contents; that I have authority to act in this matter and have signed this Notice of Inspection pursuant to my authority.

X R. L. Beck
(Signature)

7-7-86
(Date)

WITNESSES:

Francisco G Perez 07-07-86
(signed) (date)

Wayne A. Jones 7/7/86
(signed) (date)

* See reverse

EXHIBIT
A

TEX.. DEPARTMENT OF PUBLIC S. FETY
NARCOTICS SERVICE
DIVERSION INVESTIGATION UNIT
P.O. BOX 4087, N.A.S.
AUSTIN, TEXAS 78773

Telephone: 512/452-0331, Ext. 444

Nar-4b

Date 07-07-82

159a

On this date, I, Robert L. Beck, (position) D.M.D. M.D.
of the firm Robert L Beck Associates located at 4118 McCullough- San Ant 11
in San Antonio Texas, voluntarily surrendered the following listed drugs and/or records to the DPS Narcotics Agent whose signature appears below.

	NAME OF DRUG	STRENGTH	STIMULANT OR DEPRESSANT	QUANTITY
1.	Aminophylline Tablets, USP	200mg.		1 sealed bottle (in fa
2.	Seconal Sodium	50mg		9 capsules
3.	Valium	10mg		176 tablets
4.	Aspirin with Codeine	30mg		33 2½ tablets
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				

Agent, Texas Department of Public Safety
Narcotics Service.

witness

APPENDIX Q

Texas Register 5004
September 25, 1994
Chapter 109, Conduct Fair Dealing

22 TAC § 109.144

The Texas State Board of Dental Examiners proposes an amendment to § 109.44 concerning records and their transfer. . . .

§109.44. Records and Their Transfer.

(a) A Texas dental licensee practicing dentistry in Texas shall make, maintain, and keep adequate records of the diagnosis made and the treatment performed for and upon each of his dental patients for reference, identification, and protection of the patient and the dentist for a period of not less than **five** [two] years, and such records shall be available for inspection by the patient after and upon appointment with the dentists and also by the officers, agents, or employees of the Texas State Board of Dental Examiners. This shall not prohibit the transfer of records to another dentist for continued treatment or to an agreed designated consultant for ascertainment of facts.

(b)-(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on September 13, 1984.

TRD-849468

William S. Nail
Executive Director
Texas State Board of Dental
Examiners

*22 TAC § 109.144

The Texas Board of Dental Examiners adopts an amendment to § 109.144, without changes to the proposed text, published in the September 25, 1984, issue of the *Texas Register* (9 TexReg 5004). . . .

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on February 18, 1985.

TRD-851477

William S. Nail
Executive Director
Texas State Board of Dental
Examiners

Effective date: March 8, 1985